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Consent and Mistaken Belief in Consent in Tasmanian Sexual Offences Trials

Terese Henning

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**University of Tasmania Law School
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Terese Henning

Executive Summary

1. Introduction

This report is the second in a series of reports monitoring the operation of the 1987 reforms to the *Criminal Code* 1924 (Tas) and the *Evidence Act* 1910 (Tas). The purpose of the present study was to examine, in the context of sexual offences trials, the operation of the reforms to the definition of 'consent' in the Tasmanian *Criminal Code* 1924. It also examined the operation of the defence of mistaken belief in consent in these trials.

The background to the reform and the defence of mistaken belief in consent under s14 of the Code is discussed in Chapter One; the research methodology and basic quantitative findings with respect to the sexual offences tried and the lines of defence encountered are dealt with in Chapter Two; Chapter Three discusses the research findings with regard to the Crown construction of consent and key themes used by the defence to refute the Crown allegations of non-consent, to construct sexual contact as consensual and to lay a foundation for the defence of mistaken belief in consent. Chapter Four discusses findings concerning trial judges' summations and Chapter Five presents the study's conclusions and recommendations.

1.1 Background to the 1987 Reform

The current definition of 'consent' is contained in s2A of the *Criminal Code* 1924 (Tas) which provides:

'2A(1) In the code, unless the contrary intention appears, a reference to consent means a reference to a consent which is freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which the consent is given.

(2) Without limiting the meaning that may otherwise be attributable to the expression "freely given", a consent is freely given where –

- (a) it is not procured by force, fraud or threats of any kind;
- (b) it is not procured by reason of the person being overborne by the nature or position of another person; or
- (c) it is not given by a person so affected by liquor or drugs, or so otherwise affected, as to be incapable of forming a rational opinion upon the matter to which the consent is given.

(3) Where a person, against whom a crime is alleged to have been committed under Chapters XIV or XX, suffers grievous bodily harm as a result of, or in connection with, such a crime, the grievous bodily harm so suffered is *prima facie* evidence of the lack of consent on the part of that person.'

This section replaced a previous section that read:

"“consent” means a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents. A consent is said to be freely given when it is not procured by force, fraud or threats of whatever nature."

The major difference between the 1987 reform and the old provision is that the present s2A contains an expanded list of circumstances in which consent is said not to meet the statutory requirement of being 'freely given'. The reform did not affect the substance of the previous provision but retained lack of consent as the essence of most sexual offences.

In enacting the 1987 reform the Tasmanian Government declined to implement recommendations made by The Law Reform Commission of Tasmania. The Commission had recommended the enactment of a non-exhaustive list of objective circumstances that, if

present, would establish the absence of full and free consent. The object of this recommendation was to alter the emphasis upon the issue of consent in sexual offences trials, to redirect attention away from the accused's perceptions of the complainant's state of mind and characteristics and to focus attention instead upon objective factors of the accused's behaviour. The reasons that the Tasmanian Government gave for departing from the Commission's recommendations were:

- i) it was felt that the wide but general definition of consent enacted by the 1987 reform, in fact, covered the circumstances included in the Commission's list;
- ii) the recommended list amounted to nothing more than examples of the type of evidence that the prosecution would adduce under existing law to demonstrate absence of consent; and
- iii) it was considered that the recommended list would not achieve its intended aim of reducing the trial focus upon the issue of consent but, instead, would complicate and prolong trials.

1.2 Interpretation in Reported and Unreported Tasmanian Judgments of the Vitiating Circumstances in s2A(2)

Reported and unreported judgments of the Tasmanian Criminal Court and of the Tasmanian Court of Criminal Appeal support the following conclusions concerning the ambit of the different vitiating circumstances in s2A *Criminal Code* 1924 (Tas):

- i) the terms, 'force' and 'threats' in s2A(2)(a) may extend to non-physical forms of force and to threats of harm other than physical harm, for example, public humiliation;
- ii) the restrictive, common law interpretation of fraud may not apply to the term 'fraud of any kind' in s2A(2)(a). There is Tasmanian authority that suggests that any fraud that procures consent will vitiate it;
- iii) a restrictive interpretation may apply to the term, 'overborne by the nature or position of another person' in s2A(2)(b), one that essentially subsumes the operation of that provision into the requirement in s2A(1) that consent must be given by a rational person; and
- iv) the term, 'so affected by liquor or drugs...as to be incapable of forming a rational opinion on the matter to which consent is given', in s2A(2)(c) requires proof that the complainant's insobriety was of such a degree as to rob her of the capacity for rational thought.

The interpretation given in the case law to s2A(2)(b), in particular, has meant that the expectation of many of those involved in the 1987 reform process that this provision would expand the recognised circumstances of non-consensual sexual contact beyond traditional conceptions with their emphasis upon physical violence, to other behaviours with non-consensual implications for women, has remained unfulfilled.

1.3 Mistake

The defence of mistake under s14 of the Tasmanian *Criminal Code* provides a defence to sexual offences where the accused honestly and reasonably, but mistakenly, believed that the complainant was consenting to sexual contact. In contrast to the common law, the Code defence requires not only that the accused's belief in consent be honestly held, but also that it be reasonably held. At common law, it is sufficient that the accused's mistake was honest.

The question of what is reasonable is judged according to the jury's perceptions and standards. The onus of proof in relation to this defence rests with the Crown and the standard of proof is beyond reasonable doubt.

2. Research Design and Methodology

2.1 Introduction

The study involved a quantitative and a qualitative analysis of all contested cases of rape, aggravated sexual assault, indecent assault, unlawful sexual intercourse with a young person, maintaining a sexual relationship with a young person and attempts to commit these crimes that were tried in the Tasmanian Criminal Court during the period 1995 to a cut off point two-thirds into 1999. Data obtained from the transcripts of these cases was supplemented by information obtained from the case files of the Director of Public Prosecutions. Information from the transcripts was coded using the computer software package Claris Filemaker Pro and a content analysis was undertaken using the software package Atlasti. The coding was based largely on the coding booklet developed for similar research conducted in New South Wales and Victoria and designed originally by the Law Reform Commission of Victoria for research on its rape reference in 1991. The aim was to maintain as high a level of consistency as possible between all the studies in order to enable inter-jurisdictional comparison of the results.

2.2 Analysis

Because this study focused upon the conduct of sexual offences trials, how the criminal law relating to consent and mistaken belief in consent is dealt with and operates in these trials, the basic unit of research for this study was the trial. This means that where a case was tried twice, the trials were included as separate items in the data set. It was also necessary to analyse some of the data by reference to the complainants and the accused. For example, demographic details about complainants and accused were dealt with according to individual complainants and accused in order to accommodate the fact that some trials involved more than one complainant or accused and also in recognition of the fact that some accused were tried more than once in respect of the same offence. The transcripts of 55 trials were examined and coded. Five of the trials examined involved multiple accused, five accused were tried more than once in respect of the same offences and two accused stood trial twice in respect of different offences committed against different complainants. In total, 51 individual accused were tried during the period of the study. In the majority of trials there was only one complainant. However, one trial involved four complainants, three cases involving one complainant were tried twice and one case, also involving one complainant, was tried three times.

2.3 Identification of Lines of Defence

The main lines of defence available to an accused charged with one or more of the offences included in the study were:

- denial of contact with the complainant;
- admission of contact but denial of any sexual contact;
- admission of sexual contact, but denial of penetration;
- assertion that the complainant consented;
- assertion that he honestly and reasonably, but mistakenly, believed that the complainant consented;

- assertion that the event is a complete fabrication.

Additionally, in relation to indecent assault:

- that the contact that occurred was not indecent;
- that the contact was not intentional.

Additionally, in relation to attempted rape:

- that he had made no attempt to penetrate the victim, or
- that he did not have the prescribed mental element for the offence, ie. that he did not intend to penetrate the victim without her consent.

It was found that in those cases where the accused claimed that he was not the perpetrator of the offence(s) charged, this was the sole line of defence relied upon and it was readily identifiable from the transcripts. However, in other cases, the accused might adopt more than one line of defence. Where more than one line of defence was identified in a trial, all were recorded. The final decision about how to categorise the lines of defence relied upon was made by reference to counsels' addresses and, most importantly, by reference to the trial judges' summations and the defence(s) identified there as being available to the accused.

2.4 Charges Tried

It was found that a majority of the sexual offences trials during the period of the study dealt with charges of rape and indecent assault.

2.5 Lines of Defence - Frequency

The study found that where consent was available as a defence in law to the accused, it was relied upon in the overwhelming majority of trials (73%).

Mistaken belief in consent appeared as a defence less frequently than consent although it still made a significant appearance in rape trials, being left to the jury in 53% of these trials.

2.6 Factors impacting on Trial Outcomes

To maintain consistency between the present study and analyses conducted in New South Wales and Victoria, the researchers investigated the extent to which particular factors appeared to influence jury decisions. The factors analysed were:

- the lines of defence employed by the accused;
- the presence and nature of physical injuries;
- whether the accused behaved violently;
- whether a weapon was involved in the attack;
- the relationship between the complainant and the accused;
- whether prior consenting sex had occurred between the complainant and the accused;
- the complainants' response during the assault, whether she resisted or remained passive;
- whether the accused made admissions prior to trial; and
- whether the accused testified.

2.6.1 Summary of trial outcomes

In 23 (42%) of the 55 trials that occurred during the period of the study the accused were convicted of all sexual offences charged. In a further eight trials (15%) the accused were convicted of some of the sexual offences charged. In 16 trials (29%) there were full acquittals and in six trials (11%) hung verdicts were returned on all the sexual offences charged. In five trials the juries acquitted or returned hung verdicts in respect of some or all of the sexual offences charged but convicted the accused of a non-sexual offence.

2.6.2 The lines of defence employed by the accused

The study found that accused tended to be convicted of some or all of the offences charged at a greater rate in those trials where the lines of defence were denial of contact with the complainant, denial of sexual contact or penetration or the allegation that the complainant had fabricated the entire event.

There tended to be a lower rate of convictions and a higher rate of hung verdicts in cases where mistaken belief in consent was left to the jury. In a quarter of those cases where consent was the defence, the jury was unable to make up its mind as to the guilt or innocence of the accused with respect to the sexual offences charged. The percentage of hung verdicts increased to 35% in those cases where mistaken belief in consent was also left to the jury.

The relatively high percentage of indeterminate outcomes in cases where mistaken belief in consent was relied upon raises the possibility that this defence, as it currently operates, impedes the jury decision making process.

2.6.3 Evidence of physical injury

In no case examined in the present study was there evidence that the complainant had sustained grievous bodily harm such as might activate the operation of s2A(3) of the *Criminal Code* and constitute prima facie evidence of lack of consent. Accordingly, this section played no role in terms of trial outcome in any trial in the present study.

In 33 cases the Crown adduced evidence that the complainant had sustained physical injury as a result of the encounter with the accused. In one other case, the Crown adduced evidence that the accused had injured the complainant's de facto spouse, though not the complainant. In all but one of these cases, the Crown was required to prove that the complainant had not consented to sexual contact with the accused.

The acquittal rate was slightly higher in those cases where there was no evidence of injury or evidence of only minor injury than it was in those cases where there was evidence of medium level or serious injury.

While apparently useful, evidence of injury was neither sufficient nor necessary to gain a conviction. For example, in three cases where there was evidence of medium level injury and in five cases where there was evidence of minor injuries, the jury returned hung verdicts. In 13 cases, eight of which involved the issue of consent, the accused were convicted of some or all of the charges in the indictment despite there being no evidence of injury adduced at trial. In relation to this last finding, however, it is important to note that in all but two of these cases, the Crown adduced evidence of physical violence, threats or the use of a weapon.

2.6.4 Evidence of violence

Overall, evidence of violent behaviour on the part of the accused was adduced by the Crown in 34 of the trials (62%) in the present study. In 33 of these trials, the Crown was required to prove absence of consent in relation to some or all of the counts in the indictment. In a total

of five trials where evidence of violence was adduced there were full acquittals. All these trials involved the issue of consent. In 21 trials involving evidence of violence the accused were convicted of some or all of the sexual offences charged. In 20 of these trials, the Crown was required to prove that the complainant had not consented to sexual contact. In six trials, all of which involved the issue of consent, the juries returned hung verdicts on all sexual offences charges and in two, both raising issues of consent, the juries acquitted the accused on some counts but returned hung verdicts on the remainder.

In 17 of the 20 trials where mistaken belief in consent was left to the jury as a defence available to the accused, there was evidence that the accused had behaved violently. In six of these cases the accused were convicted on some or all counts of sexual offences charged. In four, there were complete acquittals, in five the juries returned hung verdicts on all counts and in two, they returned hung verdicts on the majority of the offences charged whilst acquitting the accused of the remainder.

The level of violence in those cases where acquittals and hung verdicts were returned was not insubstantial. This indicates that evidence of violence does not necessarily persuade juries that sexual contact between the complainant and the accused was non-consensual or that the accused could not honestly and reasonably have been mistaken about the complainant's consent.

In those cases, involving the question of consent, where the juries convicted the accused of other offences involving violence, such as aggravated assault or aggravated burglary, committed on the same occasion as the alleged sexual assaults, the juries' failure to convict the accused of the sexual offences cannot simply be ascribed to their rejection of the evidence that the accused behaved violently. There are a number of possible explanations, of course, for the different verdicts for the sexual and non-sexual offences, including, for example, the possibility that some jurors may consider conviction on some counts only to be an adequate reflection of the accused's overall culpability. Nevertheless, such cases do raise the concern that sexual relations under the current law may occur in highly coercive circumstances and yet, nonetheless, still be considered to be consensual. Another possible explanation is that juries may view the time of consent as isolated from any preceding violence and the freedom with which the consent was finally given as separable from the overall context of violence in which it was obtained.

2.6.5 Weapons

Conventionally, the use of a weapon by an accused is thought to provide cogent support for the complainant's account. In 16 trials where consent was in issue and in six trials where the defence of mistaken belief in consent was left to the jury the Crown adduced evidence that the accused had used a weapon. However, like both Victorian studies, the present investigation found that the involvement of a weapon did not guarantee conviction.

A puzzling feature of three of the cases in the study was the juries' apparent reluctance to convict the accused of the sexual offences charged when they were prepared to convict them of a non-sexual offence involving the use of a weapon. The juries in these cases do not appear to have viewed the accused's use of the weapon as part of the continuous fabric of the entire event, or they may not have considered the earlier use or continued presence of the weapon to be sufficiently coercive, without some additional element of force also being applied, to establish the non-consensual nature of the sexual contact that occurred.

2.6.6 The relationship between the complainant and the accused

In ten cases that were tried during the period of the study the accused were complete strangers to the complainant. In nine of these cases the accused were convicted of some or all of the offences charged. In the remaining stranger rape case the jury returned hung verdicts in respect of all the counts in the indictment. These findings are on all fours with those of the two recent Victorian rape studies.

In the majority of the remaining trials the accused were related to the complainants or were otherwise known to them. In four cases the parties had met for the first time on the night of the offences and in only one of these cases was the accused convicted. There was only one case where the accused was the spouse of the complainant. He was acquitted. In four cases the parties had been in employment relationships with each other and in all of these cases the accused were convicted of some or all counts in the indictment.

It appears that, with the exception of the cases where the complainants and the accused were strangers to each other, the nature of the accused/complainant relationship had little impact upon the trial outcome.

2.6.7 Impact of the evidence of previous consensual sexual activity between the complainant and the accused

In only a minority of trials, 11 of the 55 examined, was evidence adduced that the complainant had had previous consensual sexual relations with the accused. In only three of these cases were the accused convicted; in five the accused were acquitted and in three the jury acquitted the accused of some charges but were unable to reach a verdict on the remainder.

Evidence of prior consenting sexual contact between the complainant and the accused is traditionally considered to be particularly relevant to the issue of mistaken belief in consent. Accordingly, it is interesting to note that the defence of mistaken belief in consent was not left to the jury in any of those trials in this category where the accused were convicted of all charges. In contrast, it did feature as a defence in two trials where there were full acquittals and in two trials where the jury returned hung verdicts.

2.6.8 Complainants' response during the assault

The complainants' behaviour during any alleged sexual assault is generally of central interest in sexual offences trials involving issues of consent or mistaken belief in consent. The focus of the jury inquiry in this context is on the complainant's refusal of consent. It is not, as it would be in a civil action involving a disputed agreement, upon evidence that establishes the presence of mutual agreement. One of the consequences that flows from this is that the Crown will usually have to establish that the complainant behaved in a manner that would commonly be accepted as inconsistent with consent, and, in particular, that her behaviour unambiguously conveyed her non-consent to the accused.

The reverse is true as far as the defence case is concerned. Research has shown that a common feature of defence strategies is to represent the complainant's behaviour as inconsistent with absence of consent or genuine victim-hood.

In 22 of the 32 trials where the accused alleged consent, the complainants were cross-examined about their failure to resist or the allegedly low level of their resistance. In a little less than half of these cases (ten, 45%), the accused were convicted of some or all of the sexual offences tried. In five (23%) of these cases, the accused were acquitted on all counts. In six (27%), the jury returned hung verdicts on all counts and in one other the accused was acquitted of one count of rape but the jury failed to reach a verdict on four remaining counts.

In 15 of the 20 cases where mistaken belief in consent was in issue, the complainants were cross-examined about their lack of resistance or their insufficient resistance to the accused. In six of these cases (40%) the accused were convicted of some or all of the offences charged. In four trials there were full acquittals, in one the accused was acquitted on one count of rape and hung verdicts were returned on four remaining rape charges, and in four trials the juries returned hung verdicts on all sexual offences charged.

2.6.9 Admissions by the accused

In 18 trials there was evidence that the accused had made admissions to the police. Only three of these trials (17%) resulted in full acquittals. In two others the accused were convicted of some of the sexual offences charged and in another two trials the jury returned hung verdicts. In one trial, the jury acquitted the accused of one count of rape and returned hung verdicts in respect of three remaining counts. In ten trials (55.5%) the accused were found guilty of all charges. In a total of 12 (67%) of the trials where there was evidence of admissions made by the accused convictions were obtained on some or all counts.

In 36 trials there was no evidence that the accused had made admissions to the police. Convictions were obtained at a reduced rate in these trials compared to those where there was such evidence. In 19 (53%) the accused were convicted of some or all of the sexual offences charged. Convictions in respect of all the sexual offences charged were also obtained at a reduced rate in comparison to that obtained in cases where there was evidence of admissions. In only 14 (39%) were the accused convicted of all sexual offences charged. It is, therefore, clear that those accused who did not make admissions to police were less likely to be convicted than those who did.

2.6.10 Whether the accused testified

In relation to giving evidence at trial, accused in Tasmania now have two options— either to testify on oath or affirmation or not to testify at all. In the majority of trials in the present study where the accused asserted that the complainants had consented to sexual contact, the accused testified (23 out of 32 – 72%). In only five (22%) of these trials were the accused found guilty of all charges. In another five (22%), the accused were convicted of some of the sexual offences charged.

In six trials the accused did not testify. In half of these (three), guilty verdicts were returned on all counts. In one trial the accused was acquitted of all charges and in one other the jury was unable to reach a verdict. In one other case that resulted in three trials there were multiple accused, only some of whom testified. Different outcomes were achieved in all three of these trials. In the first, all the accused were convicted of some of the charges in the indictment. In the second trial, the jury returned hung verdicts on all counts in respect of all accused and in the third, two of the accused were convicted on all counts. The third accused was not retried in that trial but was to be tried separately at a later date. The Crown subsequently filed a *nolle prosequi* in respect of this accused and he was discharged. Taking into account the small numbers involved here, it would appear that juries are marginally more likely to accept the accused's account if he testifies in support of it.

The accused testified in 13 of the 20 cases where the defence of mistaken belief in consent was left to the jury. In just 31% (four) of these cases the jury returned guilty verdicts on some or all of the counts charged. In no case involving the defence of mistake where the accused exercised his right to silence was there a complete acquittal. These findings suggest that in cases involving mistaken belief in consent, accused are less likely to gain a complete acquittal if they exercise their right to silence at trial.

In analysing the testimony of the accused the researchers also examined whether accused were asked, either by the defence or the Crown, what steps they had taken to ascertain that complainants were consenting to sexual contact. It was found that in a total of 17 trials the accused were questioned about this matter either by the Crown or by defence counsel. This means that in 74% of cases where the accused testified, they were asked about what they had done to ascertain that complainants were consenting and, overall, in 53% of cases where consent was in issue the accused were questioned about this matter. The outcomes where the accused were cross-examined by the Crown about this matter were roughly equally divided between verdicts of guilty on some or all counts and complete acquittals.

In 15 trials the accused were questioned by their own counsel about what they did to ascertain consent. In five of these trials the accused were found guilty, in eight they were acquitted and in two hung verdicts were returned. In seven trials defence counsel did not question the accused about this matter. In five of these the accused were found guilty.

In ten of the 13 cases where the accused testified and the defence of mistaken belief in consent was left to the jury, the Crown cross-examined the accused about their conduct in establishing the existence of consent. In two of these cases the accused were found guilty.

In 11 cases where mistaken belief in consent was left to the jury, the accused were questioned by their own counsel about how they had determined consent. Three of these cases resulted in convictions, six resulted in acquittals and two in hung verdicts.

Perhaps the most striking result of the analysis here is the finding that overall, in only six trials, that is 26% of trials where accused testified and 19% of trials where they asserted that complainants had consented to sexual contact, were the accused able to give evidence of any positive steps that they had taken to obtain or ascertain the complainants' consent. In only five of the trials where the accused testified and where the defence of mistaken belief in consent was left to the jury was there evidence of positive steps that had been taken by the accused to ascertain or obtain the complainants' consent.

3. Crown Construction of Non-consent and Key Themes in Defence Construction of Consent and Mistake

3.1 Crown and Defence Construction of Non-Consent and Consent

Consent in the context of the criminal law is couched in terms of a negative burden. The onus is upon the Crown to establish that the complainant did not consent to sexual contact with the accused. In practice this means that consent is presumed to exist until the opposite is proved to the requisite standard. Accordingly, it is incumbent upon the Crown to provide independent evidence of non-consent apart from the complainant's mere assertion of it at trial. It also means that, in practice, though not in law, the Crown has limited manoeuvrability in establishing absence of consent and will generally be constrained to rely upon one of the vitiating circumstances in s2A(2) to discharge its responsibility in this regard.

In 44 trials in the present study, the Crown was required to prove absence of consent. For each of these cases the basis upon which the Crown sought to establish non-consent was recorded to determine the extent to which the statutory grounds listed in s2A of the *Criminal Code* as vitiating consent were relied upon. The particulars of the evidence adduced by the Crown to substantiate the complainant's claim of non-consent were also recorded to enable a more detailed understanding to be gained of the consent issue in the trial context. In particular, this evidence was sub-categorised to determine the existence of specific patterns in relation to the different vitiating circumstances. For example, in cases where the Crown relied upon evidence that the accused had used a weapon, the type of weapon employed was

recorded. In cases where the Crown relied upon evidence of force or threats made by the accused to establish that consent had not been freely given, the type of force and the nature of the threats made were also recorded.

It was found that most commonly, the Crown relied upon evidence of physical force or threats to prove that consent had not been freely given.

3.1.1 Force

The force relied upon by the Crown to establish non-consent consisted of physical violence in 92% of cases, use of a weapon in 44% of cases and physical injury in 92% of cases, this being of a minor nature in the majority of cases.

In no case were the injuries treated as amounting to grievous bodily harm within the meaning of s2A(3) of the *Criminal Code*.

In 18 of the 20 trials where the defence of mistaken belief in consent was left to the jury, the Crown adduced evidence of force.

3.1.2 Threats

Threats comprised the next most common basis after physical force upon which the Crown relied to establish absence of consent. Overall, evidence of threats was adduced in 25 (57%) of the cases where the Crown was required to establish absence of consent. In all these cases the threats involved threats of physical injury to the complainant and in one case as well, the accused threatened to kill members of the complainant's family. In 16 trials, the evidence of threats adduced by the Crown involved threats with a weapon.

In 12 cases where mistaken belief in consent was relied upon by the accused, the Crown tendered evidence of threats, all involving threatened physical harm to the complainant.

3.1.3 Fraud

Fraud was relied upon by the Crown to establish that consent had not been freely given in only one trial. In that case the Crown alleged that the complainant had submitted to the accused's masturbation of his, the complainant's, penis because he was induced to believe, by the accused's deliberate and deceitful conduct, that what was happening was part of a legitimate clinical or diagnostic procedure.

3.1.4 Complainant overborne

The Crown sought to establish absence of consent on the basis that the complainants' will had been overborne by the nature or position of the accused in only four trials. In two of these trials the Crown relied upon the complainants' young age to establish that they had been overborne. The third case involved an employer/employee relationship and the fourth case concerned a doctor/patient relationship. In this last case, the Crown also relied upon fraud to vitiate consent.

3.1.5 Drug or alcohol induced incapacity

Drug or alcohol induced incapacity to consent was relied upon by the Crown to exclude consent in only two cases.

3.1.6 Inability to form a rational opinion

This was relied upon to negative consent in only one trial, involving three male complainants aged between four and 14 at the times that the offences were committed. Their incapacity to form a rational opinion was constructed on the basis of their immature ages at the time that

the earliest offences were committed. This case also comprised one of those where the Crown alleged non-consent upon the basis that the complainants had been overborne by the nature and position of the accused.

3.2 Defences to Evidence of Non-Consent

3.2.1 Defences to evidence of physical injury

In the majority of trials involving evidence of injury the accused simply denied causing it. In three trials it was asserted that the complainants had inflicted the injury deliberately upon themselves. In four cases where the accused denied causing the injury it was claimed that the injury had been sustained through no fault of the accused during the course of consenting sexual conduct and in 11 cases, the accused asserted that the complainants' injuries were consistent with consensual sexual contact.

3.2.2 Defences to evidence of violent behaviour

In the majority of cases where there was evidence of violent behaviour on the part of the accused, (26 out of 33), its existence was simply denied by the accused. In one case, the accused asserted that the complainant, and not he, had behaved violently.

In four trials, the accused claimed that the evidence of physical violence was either part of or consistent with consensual sexual conduct. In none of these cases were the accused convicted of any of the sexual offences charged. In three trials the accused denied that they had been responsible for the violent behaviour and in one case no explanation was put forward by the defence.

3.2.3 Defences to evidence of weapons

The most common response by the accused to Crown evidence that a weapon had been used to threaten the complainant, was denial that this had occurred. However, in six trials the accused admitted that a weapon had been used but maintained that, nevertheless, the complainant had freely consented to sex. These findings conform to those of the first Victorian study.

In three of these trials the accused alleged that the weapon had not been used to threaten the complainants but claimed instead that their unfulfilled intention had been to commit suicide. In two trials the accused denied using the weapon in a threatening manner, and in one, the accused did not offer any real excuse for the presence of the weapon. He nevertheless, asserted that the complainant had consented to sexual intercourse.

3.3 Defence Strategies to Undermine the Credibility of the Complainants' Assertions of Non-consent.

In conformity with other recent Australian studies, the present research evaluated the extent to which particular themes were deployed by the defence in the trials examined to undermine the credibility of complainants' assertions of non-consent or to convey the impression that complainants were responsible for the accused's conduct. The specific themes explored were:

- whether the complainant behaved in a sexually provocative manner;
- whether the complainant had been drinking or had taken drugs on the day of the offence;
- the style of clothing worn by the complainant;
- the representation of the complainant as responsible for or as contributing to the offence;
- the representation of the complainant as lying or fabricating her account;

- the lack of physical injury to the complainant as a result of the offence; and
- inadequate resistance offered by complainants during the assault.

3.3.1 Sexually provocative behaviour on the part of the complainant.

In almost half of the trials examined, complainants were questioned about having flirted with or having behaved in a sexually suggestive fashion in the presence of the accused. This is a slightly lower rate than was found by the New South Wales study, but roughly equivalent to that found by the most recent Victorian study.

3.3.2 Drinking or taking other drugs

Over 60% of complainants in trials where the accused asserted that sexual contact was consensual and 70% of complainants in cases where the accused relied upon the defence of mistaken belief in consent, were cross-examined about their alcohol consumption or drug taking either in general, or on the day of the offence. This rate is similar to that found by the New South Wales study (60%) but higher than that found in the most recent Victorian study (51.3%).

3.3.3 Style of clothing

The rate at which complainants were questioned about their clothing (41% of consent trials and 50% of mistaken belief in consent trials) is comparable to that found by the New South Wales study (44%) but greatly in excess of the rate found in the most recent Victorian study (16%). In the New South Wales and Victorian studies it was found that the aim of the defence questioning was to raise the inference that the complainant's dress was sexually suggestive. In contrast, in the present study this theme only emerged in a small number of cases, specifically those where the complainant was wearing nightclothes when the attack occurred. More commonly it was found that cross-examination aimed to show that the clothing was protective and could not have been removed unless done consensually.

3.3.4 The complainants' contribution to or responsibility for the offence

This cross-examination theme featured in almost 70% of the trials where consent was relied upon by the accused and in 80% of cases where the defence of mistaken belief in consent was left to the jury. This is a significantly higher proportion of cases than was found in the New South Wales study. This matter has not been investigated in Victoria. Cross-examination on this theme usually aimed to show that the complainant's behaviour precipitated the course of events that followed or was indicative in some way that she was sexually available to the accused.

3.3.5 Lying or fabricating the account

A clear majority of complainants were cross-examined about whether they were lying or fabricating their account (75% and 80%). This rate is consistent with the New South Wales research but higher than the Victorian study (60%). In deploying this theme defence counsel paid particular attention to minute details of the event. Any confusion or failure by the complainant to remember these details was then represented as exposing her mendacity. Generally, though not always, the accused asserted that complainants had a motive for lying.

3.3.6 Lack of injury

In 17 (53%) of the trials where the accused alleged consent, complainants were questioned about the fact that they had sustained no injuries or relatively few injuries in the assault. In some cases, this cross-examination reflected the notion that genuinely non-consensual sex necessarily occasions genital or other physical injury. In other cases, the cross-examination

was directed at discrediting the complainants' assertions that the accused had used the degree of force alleged.

3.3.7 Inadequate communication of refusal and inadequate resistance offered by complainants during the assault

In all cases where the accused asserted that the complainants had consented to sexual contact, the complainants were questioned about how they had communicated their lack of consent to the accused. In all but three of these cases (29), complainants testified that their refusal of consent was communicated verbally, by for example, saying 'no' to the accused or by telling the accused to leave them alone or by screaming or swearing at the accused. In 22 of these cases, complainants testified that their verbal refusal of consent was accompanied by physical resistance.

In 69% of trials, complainants were cross-examined about their alleged failure to resist or about the low level of their resistance. In 75% of cases where mistaken belief in consent was left to the jury, complainants were cross-examined about these matters.

The object of defence counsel in cross-examining complainants on this theme was to establish that their response had not sufficiently demonstrated absence of consent or that their behaviour provided a foundation for a mistaken belief in consent. This construction would not be readily available if s4(g) of the Criminal Code Amendment Bill (Tas) 1999 were enacted. This reform requires trial judges to direct juries that a person is not to be regarded as having freely agreed to sexual contact just because she or he did not protest or physically resist. Trial judges must also tell juries that the fact that a person did not do or say anything to indicate free agreement is normally enough to show that the act took place without that person's free agreement. In addition, under the Bill 'consent' is defined as 'free agreement'. It is difficult to see how passivity, silence, or lack of resistance could be viewed as conveying free agreement or as providing a foundation for any belief by the accused that the complainant had conveyed her agreement to sexual intercourse.

4. Judicial Construction of Consent and Mistaken Belief in Consent

4.1 Introduction

Trial judges' summations to the jury were examined to determine how the concepts of consent and absence of consent were explained to the jury. This analysis involved two steps. First, the general explanations of consent provided by the judges were considered. Second, the interpretations provided of the vitiating circumstances in s2A were analysed. A similar analysis was undertaken in relation to the defence of mistaken belief in consent.

Matters of particular interest in this part of the investigation were whether the concept of consent was ever interpreted as involving elements of mutual agreement between sexual partners and whether trial judges ever took the view that consent may be given reluctantly or grudgingly but, nevertheless, still be considered to have been freely given.

The study also examined how trial judges dealt with evidence relevant to consent and the defence of mistake. In this part of the analysis certain controversial issues were dealt with, namely the notions that passivity can be equated with consent, that complainants have a responsibility to communicate absence of consent without there being any accompanying responsibility upon an accused to take steps to ascertain consent, and that evidence of physical injury or damage to clothing is a reasonably expected concomitant of non-consent.

4.2 General Interpretation of Consent

In the majority of cases, the trial judges' consideration of the general concept of consent was confined to the terms of s2A. Subsection (3) of s2A was not mentioned in any trial in the present study. In 13 cases, trial judges attempted an analysis beyond the terms of s2A. In this regard two themes emerged:-

4.2.1 Consent is not submission

In nine cases, the trial judges stressed that consent is not to be equated with mere submission or lack of resistance; and

4.2.2 Consent need not be stated

In three cases the trial judges indicated that consent can take a variety of forms and that consent might be found to have been given even though the complainant did not give express verbal consent.

4.3 Force and Threats

The present analysis of trial judges' approach to force and threats was directed by three specific issues identified from the pre-law-reform debate, first, what types of threat and force were regarded as vitiating consent, second and interrelated to the first issue, to what extent forms of force other than physical violence or threats of physical harm informed trial judges' depiction of these concepts and, finally, whether the presumption of consent was ever seen to have been potentially displaced by evidence of force or threats.

4.3.1 Judges' depiction of force and threats

It was found that in all cases where trial judges dealt with the issues of force and threats, they described these concepts in terms of physical harm. This approach may be explicable on the basis that physical harms comprise the most readily understandable forms of harm and also because they were, in any event, the most relevant type of harm to the particular factual issues before the juries.

4.3.2 Rape does not necessarily involve force, threats or resistance

It was also found that trial judges were concerned to displace any preconceptions that jurors may have that real rape necessarily involves evidence of physical subjugation of the complainant. In a number of summations trial judges directed juries that rape is not confined to cases involving violence, injury or physical force.

4.3.3 Force, threats, violence and injury not treated as rebutting the presumption of consent

None of the trial judges in the trials examined went as far as treating evidence of force or threats as *prima facie* displacing the presumption of consent. Instead, they explained why compliance resulting from force is not treated in law as genuine consent and dealt with evidence of force, threats and violence as something to be taken into account by the jury in assessing the presence or absence of consent. In only five trials in the present study did the judges provide a more evaluative approach and suggest that the Crown evidence, if accepted, would not be consistent with a freely given consent.

This type of approach might justifiably be applied in all cases involving evidence of force and violence. Not to direct the jury in that way may, in fact, leave the impression that a significant level of force, injury and violence can reasonably be consonant with consensual sexual contact or, alternatively, that it may have no operative effect at all in relation to consent.

The *Code* itself appears to leave open the possibility that violence, force and physical injury may be compatible with consent. Under s2A, the only circumstance where evidence of violence or injury can be treated as *prima facie* establishing absence of consent is where that violence has produced or the injury amounts to grievous bodily harm.

It is submitted that the definition of 'consent' as 'free agreement' contained in s4(a) of the Criminal Code Amendment Bill (Tas) 1999 may go some way to altering perceptions about what constitutes real consent in the context of sexual relations and about the role of force in that context. The proposed definition aims to incorporate elements of mutuality into the concept of consent. Arguably, force and mutually-free agreement are mutually exclusive concepts. The problem with the term 'consent', is that it appears to retain, despite, trial judges' often careful directions to the contrary, a residual component of submission, of one person giving in to the wishes of another. The term 'free agreement' contains no such connotations. Therefore, it may oust the possibility that force can play any legitimate role in sexual encounters.

4.4 Fraud

The question of whether consent had been vitiated by fraud arose in only one trial examined in the present study. This case involved an alleged fraudulent medical examination of the complainant's penis by the accused, a medical student. The summation adopted a radically different approach to the interpretation of fraud to that applied at common law and did not follow the much-criticised decision of the Victorian Court of Criminal Appeal in *Mobilio*. The trial judge in the Tasmanian case accepted that the purpose for which an accused's act was performed could be determinative of its nature. This means that if a complainant consents to an accused's act because he or she has been induced to believe that it has a non-sexual purpose, that consent will be vitiated by fraud or mistake if the act, in fact, has a sexual purpose.

This approach, if adopted by the majority of the Tasmanian Supreme Court judges, would obviate the need for the type of reform that has been adopted in a number of Australian jurisdictions to overcome the decision in *Mobilio*. These reforms have resulted in the inclusion among the statutory circumstances vitiating consent, the complainant's mistaken belief that the act is for medical or hygienic purposes.

4.5 Being Overborne By the Nature or Position of Another Person

Section 2A(2)(b) arose in only four trials in the present study. In two of these cases the critical factor involved in the overbearing of the complainants was the disparate ages of the complainants and the accused. In the third case, it was the doctor/patient relationship of the complainant and the accused and in the fourth case it was their employer/employee relationship coupled with their disparate ages.

In three of these cases, s2A(2)(b) was given a narrow interpretation consonant with that adopted by the Tasmanian Court of Criminal Appeal in *Crisp*, the sole reported judgment on this section to date. The trial judges essentially ascribed the complainants' lack of valid consent to their lack of a mature understanding, to their inability to comprehend that they had a right to refuse or, to some supplementary, oppressive conduct on the part of the accused. This approach effectively subsumes being overborne into the rationality requirement of s2A(2)(1) or equates it with submitting as a result of threats or force under s2A(2)(a).

In contrast to these three cases, the judge's analysis in the fourth case was concerned with the accused's tacit exploitation of inherently coercive features of the employer/employee relationship. Here, the trial judge did not depict the complainant's absence of consent in

terms of a lack of real choice to refuse or a lack of appreciation that refusal was an option, but rather in terms of an implicitly applied and unacceptable pressure to submit derived from the accused's employer status in relation to the complainant.

Clearly this approach achieves a much wider interpretation and application for s2A(2)(b) than any other case considered here. However, an appeal has been lodged in this case which, at the time of writing, was yet to be heard. If the narrower approach to s2A(2)(b) adopted in *Crisp* is confirmed by the Court of Appeal, this would suggest that the hopes of those who envisaged this provision as enabling recognition of non-traditional constraints upon consent are unlikely to be fulfilled. Accordingly, it might be wise to expand the list of circumstances recognised as negating consent in s2A to provide as comprehensive a list of such circumstances as possible. The reform contained in the Criminal Code Amendment Bill (Tas) 1999, s4(a) provides such an expanded list. However, instead of retaining the vitiating circumstance in s2A(2)(b), as does the current Tasmanian Bill, it may be wise to replace it with a provision along the lines of s92P(h) of the *Crimes Act* (ACT) 1900. This section provides that a person does not freely agree if their agreement or submission is caused by the abuse by another person of his or her position of authority over or professional or other trust in relation to the person.

It is submitted that this provision is clearer and has a wider scope than s2A(2)(b). It is clearly not limited to situations where the complainant has no understanding of, or ability to, exercise his or her right to refuse consent. Further, its application is not dependent upon the complainant's will being overborne. It also potentially encompasses a number of social relationships that may not be entirely covered by the Tasmanian provision, for example, professional relationships like that of doctor and patient and teacher and student. It also covers relationships of trust and authority like parent/child relationships, employer/employee relationships and custodian relationships.

4.6 'Being So Affected by Liquor or Drugs...as to be Incapable of Forming a Rational Opinion on the Matter to which Consent is Given'

While over 60% of complainants in the trials in the present study were questioned about their drug or alcohol consumption, the Crown relied upon drug or alcohol induced incapacity to consent to establish absence of consent in only two trials. The point made by both judges in summing up in these cases was that if the complainant was found not to have been capable of making a rational decision, that disposed of the issue of consent.

In 16 other trials the judges commented upon the implications of the complainants' alcohol consumption, usually to explain the meaning of the term 'sober' in s2A(1). In doing so trial judges made two things clear. First, they consistently stated that the requirement in s2A(1) that consent be given by a 'sober' person has no independent role as a ground for vitiating consent separate from that specified in s2A(2)(c) - alcohol or drug induced incapacity to consent. Second, they maintained that insobriety alone will not vitiate consent. To have this affect, both s2A(1) and s2A(2)(c) require that the insobriety be such as to render the complainant incapable of making a rational decision.

There are, of course, practical difficulties confronting the Crown in establishing the degree of intoxication induced incapacity required by this interpretation of s2A(1) and s2A(2)(c). At this level of intoxication, the complainant is unlikely to retain an accurate memory of the event. Unless there are independent witnesses to the offence or the accused makes fortuitous admissions, the offence will probably remain unreported. This raises the question whether the level of intoxication required to vitiate consent should be set at a lesser level than the current law provides.

The debate surrounding this question involves both practical and theoretical issues. On the one hand there is the argument that the high level of intoxication currently required by the *Criminal Code* facilitates unconscionable conduct on the part of sexual predators who may exploit another person's inebriated state for sexual purposes knowing that, if sober, that person might not agree to sexual contact. It is also argued that, at the very least, the jurisdiction of the jury to determine the validity of intoxication produced consent should be couched in much wider terms than currently exist. The jury should be permitted a much broader scope in deciding what affect intoxication had upon the existence of genuine agreement to sexual intercourse.

The countervailing argument is that such a proposal would stretch the boundaries of unlawful sexual conduct too far, that the protection of sexual autonomy does not require that all forms of immoral sexual conduct be criminalised. Extending the reach of the criminal law further in this area, it is suggested, would place too heavy a responsibility on individuals for the decisions of their sexual partners, and would, in any event, run counter to the reality of current ordinarily accepted sexual practices.

At a practical level, it is difficult to envisage how intoxication short of incapacitation would operate to negate consent. For example, would it be sufficient to establish that the complainant only consented because she was inebriated and that she would otherwise not have consented, or would it additionally be necessary to establish that the accused was aware that this was the nature of her consent? In any event, the accused would be able to rely upon the defence of honest and reasonable but mistaken belief that the complainant's consent was wholehearted.

4.7 Interpretation of Mistaken Belief in Consent

4.7.1 Application of the defence of mistake

In eight of the 20 cases where trial judges left the defence of mistaken belief in consent to the jury, they did so of their own motion. The accused had not specifically relied upon this defence as part of their case. In the remaining 12 cases, it had expressly been relied upon by the accused.

In six of the cases where trial judges left the defence of mistake to the jury of their own motion, they did so on the basis that this defence is generally applicable in sexual offences trials and a matter that the Crown bears the onus of disproving. Possibly the most interesting aspect of these cases is that in the majority of them, the trial judges left the question of mistaken belief in consent to the jury without indicating what specific items of evidence adduced in the trials might be considered to be relevant to its determination. The jury was simply referred to the totality of the evidence in the case.

The problem with this approach is that it may not constitute an adequate discharge of the trial judge's settled duty with respect to summing up as set out in *Lawrence and Alford v Magee*. Its main deficiency is that it does not apply the evidence in the case to the law in any detail. As a result it may not sufficiently elucidate for the jury the legal and factual issues being tried. It may leave the jury more confused than enlightened about the law and its application to the particular facts of the case.

An equally important issue arising from these cases is whether the trial judges were actually justified in leaving the defence of mistaken belief in consent to the jury. This defence should not be left to the jury unless there is evidence capable of raising a reasonable doubt as to its

existence. In two Tasmanian Court of Criminal Appeal decisions, *Ingram*¹ and *Dalwood*,² it was made clear that the defence of mistake should be left to the jury wherever there is evidence capable of supporting it. However, it was made equally clear that there must be a sufficient evidentiary foundation for the defence to justify this being done. Where trial judges simply referred the jury to the entirety of the evidence or incorporated the defence of mistaken belief into the definition of the offence without referring to any precise evidentiary foundation for it, it remains unclear whether the trial judges have actually determined that it has a real evidentiary foundation.

It is submitted that the approach now applied in Canadian cases is to be preferred. This requires the trial judge to make a clear preliminary determination as to the existence of any evidence that lends 'an air of reality to the defence'.³

Further, in four of the cases where the trial judges left the defence of mistake to the jury of their own motion, they appear to have overlooked the important point made by Chambers J in *Ingram*, that it may be inappropriate to leave the defence of mistake where the accounts of the accused and the complainants are in 'stark' and 'violent contrast', the accused alleging mutual consent, the complainants asserting profound levels of violence. In these four cases the Crown and defence versions of events fitted this description.

4.8 General Directions Concerning Mistaken Belief in Consent

With regard to the general directions given in relation to mistaken belief in consent, trial judges' summations usually followed a standard pattern. First the elements of the defence were set out and then an explanation was given as to who bore the onus of proof in relation to it. Subsequently, trial judges might augment that direction by referring to illustrative examples or by indicating when a mistaken belief would not qualify as honest or reasonable. The role of intoxication and the role of the complainant in relation to the defence might also be explained.

4.9 Evidence Relevant to Consent and Mistaken Belief in Consent

The main categories of evidence identified as potentially relevant to the issues of consent and mistaken belief in consent were:-

4.9.1 Passivity or lack of resistance

The study found that in 45% of cases (20) where the defence of consent was available, the trial judges considered evidence of the complainants' alleged lack of resistance in their summations. Generally, trial judges left the interpretation of this evidence to the jury and did not suggest possible constructions that might be placed upon it.

However, in two cases lack of resistance was specifically interpreted as consistent with a finding that the complainants had consented. Had the reform contained in s4(g) of the Criminal Code Amendment Bill 1999 (Tas) then had the force of law, it is unlikely that this approach would have been applied. This reform mandates the trial judge to direct the jury that the complainant is not to be regarded as having consented just because he or she did not

¹ [1972] Tas S.R. 250.

² Unreported Court of Criminal Appeal Decision, Serial No 99/1967. While both *Ingram* and *Dalwood* are now wrong on the onus or proof in relation to the defence of mistake, (see *He Kaw Teh* (1985) 157 C.L.R. 523 and *Brown* Unreported Court of Criminal Appeal decision, Serial No 7/1990), they are otherwise sound on the operation of this defence in relation to sexual assault cases.

³ *R v Esau* [1997] 2 S.C.R. 120; *R v Osolin* [1993] 4 S.C.R. 595; *R v Ewanchuk* (1999) 131 C.C.C. 481.

do anything to indicate his or her lack of consent, and further, that this fact is normally enough to indicate absence of consent.

In one case the trial judge withdrew a charge of attempted rape from the jury on the basis primarily of the complainant's lack of resistance. In doing so, the judge assessed the accused's state of mind entirely according to the complainant's conduct. There was no analysis of this issue from the point of view of the accused's conduct, from, for example, attempts he may or may not have made to ascertain the complainant's attitude to sexual contact before pressing his sexual advances upon her. The trial judge's approach in this case is also open to criticism because it was grounded on an anomalous reading of the evidence.

Again, had the *Criminal Code* contained the reforms provided in s4(b) and (g) of the Criminal Code Amendment Bill 1999 (Tas) the judge in this case may have held a different view of the facts. The first of these reforms provides that an accused cannot rely upon the defence of mistaken belief unless he took reasonable steps to ascertain that the complainant was consenting. As detailed above, the second requires the trial judge to direct the jury that the complainant is not to be regarded as having consented just because she did not do or say anything to indicate lack of consent and further that the fact that she did not do or say anything to indicate free agreement is normally enough to show that there was no free agreement to what took place.

Evidence that the complainant did not resist or respond to the accused is conventionally seen as providing a possible foundation for the defence of mistaken belief in consent. In ten trials where the defence of mistaken belief in consent was left to the jury, the trial judges referred to evidence of the complainants' lack of resistance. Nevertheless, they did not usually specifically spell out the relevance of that evidence to the issue of mistake or explore in detail its possible implications for that defence. However, in three summations, the trial judges did make a specific link between complainants' unresisting behaviour and the defence of mistaken belief in consent. In one of these cases, the evidence was related to the complainant's intoxicated state and dealt with as consistent with gross intoxication and as, therefore, potentially giving the lie to any claim of mistaken belief in consent. In contrast, in the remaining cases, the evidence was dealt with as a possible basis for a mistaken belief in consent. In both these cases the accused's state of belief was analysed entirely according to the complainants' conduct. There was no attempt made to examine the accused's conduct and consider what they did to come to an understanding of the complainants' willingness to engage in sexual conduct.

4.9.2 Communication in relation to consent

The present study found that even when accused testified they were not always questioned about what steps they may have taken to ensure that complainants were consenting to sexual contact. In contrast, complainants were always questioned about what they did to communicate their lack of consent to the accused.

The present study was interested to learn how trial judges dealt with the parties' communication about and ascertainment of consent. This matter is particularly relevant where the defence of mistake is in issue. This is because in such cases, the accused's state of belief and the honesty and reasonableness of that belief are of central concern to the jury.

In no case in the present study was the reasonableness of the accused's mistaken belief in consent assessed according to what he did or did not do to verify that belief. In all cases, trial judges dealt with questions concerning both the existence of consent and the honesty and reasonableness of any mistaken belief that complainants' had consented by examining the

complainants' conduct and querying whether that conduct could reasonably have been construed as consistent with consent or whether, on the contrary, it was inconsistent with genuine consent and would have disabused the accused of any mistaken belief they may have held. In two cases, the trial judges specifically stated that if the jurors accepted that the complainants had verbally rejected the accuseds' sexual advances, they might well conclude that any belief in consent on the part of the accused could not have had a reasonable basis.

In a small number of cases, reference was made to positive steps that had been taken by the accused to obtain complainants' consent. However, such references were exceptional and ran counter to the general trend. Moreover, even in these cases, the accuseds' attempts to obtain or ascertain consent were not explicitly dealt with as a possible basis for assessing either the existence of genuine consent or the honesty or reasonableness of any mistaken belief in consent that the accused may have had. Usually such references were simply included in the trial judges' narration of the competing versions of events.

The Criminal Code Amendment Bill 1999 (Tas), seeks to ameliorate the imbalance permitted by the current law in relation to the communication of consent. It attempts to create what has been termed a 'communication standard'⁴ in sexual relations so that an accused cannot assume consent exists unless a complainant has positively communicated her agreement to engage in sexual activity. It also requires that an accused who claims to have been mistaken about the complainant's agreement to engage in sexual activity take reasonable steps to ascertain the complainant's willingness in this regard. his approach is embodied in reforms contained in the Criminal Code Amendment Bill 1999 (Tas), ss4(a), (b) and (g).

4.9.3 Admissions by the accused

Evidence of admissions made by an accused gives the jury a window onto his state of mind and, therefore, is potentially relevant to the defence of mistaken belief in consent. In nine trials where the defence of mistaken belief in consent was left to the jury, evidence of admissions made by the accused to the police was adduced by the Crown.

In four of these trials that evidence concerned admissions that the accused had continued to have sexual intercourse after he became aware that the complainant had withdrawn an alleged initial consent. Prima facie, such evidence not only established that the complainant was not consenting to sexual contact but also that the accused could not have been, or could no longer have been, mistaken about that fact. In all of these cases, the trial judges related that evidence to the question of consent. In one, it was also related to the defence of mistake.

4.9.4 Evidence of violence and force

The prevailing pattern of trial judges' summations when dealing with evidence of force and violence was to juxtapose the essential elements of the Crown and defence accounts of that evidence in a narrative style indicating what those competing versions said in relation to the question of consent and the defence of mistake. Usually this was incorporated into the trial judges' overall summary of the Crown and defence evidence.

In only six trials in the present study, was the evidence related by trial judges more closely to the issues of consent and mistake and were suggestions made concerning the potential ramifications of that evidence for the determination of those issues.

⁴ B McSherry, (1992) 'Legislating to Change Social Attitudes: The Significance of s 37A of the Victorian Crimes Act 1958' in P Easteal, ed *Without Consent: Confronting Adult Sexual Violence*, Canberra: Australian Institute of Criminology; The Hon. Justice EW Thomas (1994) 'Was Eve Merely Framed ; or Was She Forsaken?' *New Zealand Law Journal*, November, pp 427-432

The level of force and violence allegedly inflicted in a number of those cases where mistaken belief in consent was left to the jury, in conjunction with the general tendency of trial judges not to specify the possible implications of such evidence for the issues of consent and mistake, raises questions about the current operation of mistake as a defence and the role of the trial judge in relation to it. Specifically, there is the question whether it should be the usual rather than the exceptional practice of trial judges to explain the implications of evidence of violence in the way observed in those six trials in the present study where such an explanation was given. Additionally, there is the question whether the defence of mistake can legitimately be left to the jury in cases involving force and violence.

Not to leave this defence to the jury because there is evidence violence would require the trial judge to make a determination of fact not within his or her jurisdiction. However, this defence should not be left unless there is evidence capable of raising a reasonable doubt as to its existence. It is apparent that there can be profound difficulties for both trial judges and juries in dealing with this defence in cases involving evidence of violence. The fact that difficulties do arise can be seen in those cases where the jury clearly accepted that the accused had behaved violently, that acceptance being evidenced by their guilty verdicts in respect of non-sexual offences charged involving that violence, and yet acquitted the accused or returned hung verdicts in respect of the sexual offences with which he was charged. In these cases it was found that the trial judges gave little guidance to the jury as to how the evidence might be applied to resolve the question of mistaken belief in consent. The juries were left substantially to their own devices in applying the evidence to the law. As mentioned earlier, this raises the possibility that such summations failed to meet the legal requirements set for judicial summing up.

These cases also suggest that there is a useful role in sexual offences cases for the reform contained in s4(b) of The Criminal Code Amendment Bill 1999 (Tas), which makes the availability of the defence of mistaken belief in consent conditional upon the accused having taken reasonable steps to ascertain that the complainant was consenting. The test contained in s4(b) provides a simple and common-sense mechanism for judging whether an accused's mistaken belief can be said to be truly reasonable. It excludes the possibility of a belief being considered to be reasonable where the accused has not taken reasonable steps to verify the existence of consent. The effect of this test would be to remove the defence in many cases where it is now apparently left as a matter of course. Further, it would equip trial judges with the means to direct juries on mistake in ways that may presently be thought to be inappropriate.

4.9.5 Evidence of physical injury or damage to clothing is a reasonably expected concomitant of genuine non-consent.

In only two trials in the present study was it found that trial judges had commented to juries that the absence of injury to the complainant or to her clothing might be relevant to their determination of the presence or absence of consent.

Accordingly, while it was unusual for a trial judge to construct evidence of absence of injury to complainants or lack of damage to their clothing as potentially consistent with consent, or to portray such injury and damage as a reasonably expected concomitant of genuine non-consent, it is apparent that this view does still find expression.

5. Conclusions and Recommendations

5.1. Consent

It was found that the issue of consent was the central matter for determination in the majority of sexual offences trials occurring during the period of the study. Further, it was found that absence of consent was predominantly constructed by the Crown on the basis that the complainants' compliance was obtained through the use of physical force.

However, the extreme levels of violence and major injuries that are stereotypically associated with sexual assaults were evident in relatively few trials. Nevertheless, in a number of cases, juries appear to have accepted that consensual sexual contact is compatible with quite high levels of violent behaviour. This was particularly evident in those cases where the accused were convicted of non-sexual offences involving violence committed on the same occasion as the sexual offences charged, and yet not convicted of those sexual offences. However, in no trial was there evidence of grievous bodily harm within the meaning of s2A(3) of the *Criminal Code* such that could constitute prima facie evidence of lack of consent. Accordingly, this study supports conclusions that have been voiced elsewhere that provisions like s2A(3) are likely to have minimal or no impact on sexual offences trials.⁵

The focus of attention in determining both complainants' and accused's states of mind, (that is, whether the complainant had consented to sexual contact and whether the accused might have honestly and reasonably, though mistakenly, believed that she was consenting), was upon complainants' conduct and what complainants did to communicate unequivocally their refusal of consent. In only a minority of cases did the accused give evidence of positive steps that they had taken to obtain or ascertain consent.

These features of sexual offences trials appear to be the logical outcome of the fact that under the current law, 'the concept of consent applies in the negative'⁶ which means that 'the law looks for manifest dissent rather than positive assent'.⁷ The result is that concepts of mutuality and reciprocity between sexual partners do not play any meaningful role in the current criminal law relating to sexual offences.

In recent years the view has been expressed that the criminal law, both in form and in practice, fails to recognise and adequately protect the equal rights and autonomy of sexual partners and that one reason for this failure is that it conceptualises consent in the negative, as requiring proof of dissent, rather than conceptualising it in the positive, as involving mutual agreement.⁸ The reforms contained in s4(a) and (g) of the Criminal Code Amendment Bill 1999 (Tas.) aim to ameliorate this problem. These reforms aim to establish a communication standard and to incorporate concepts of mutuality into the criminal law relating to sexual offences.

⁵ See for example, The Hon. Justice EW Thomas, (1994), *ibid.*, p 429.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.* and see also B McSherry, (1998) 'Constructing Lack of Consent' in P Eastal (ed) *Balancing the Scales*, Sydney: Federation Press, pp 6-40; V Waye, (1992), 'Rape and the Unconscionable Bargain' *Criminal Law Journal*, 16, pp 94-105; S Bronitt, (1992) 'Rape and Lack of Consent' *Criminal Law Journal*, Vol 16, pp 289-310; C Boyle (1994) 'The Judicial Construction of Sexual Assault Offences' in J Roberts and R Mohr (eds) *Confronting Sexual Assault: A Decade of Social and Legal Change*, Toronto: University of Toronto Press pp 137-156; D Cameron, (1994) 'Degrees of Consent', *Trouble and Strife*, 28 Spring, pp 27-30; L Jamieson, (1996) 'The Social Construction of Consent Revisited' in L Adkins, and V Merchant, eds *Sexualising the Social*, Basingstoke: Macmillan, pp 55-73.

It is submitted that these reforms would achieve more than a mere semantic change in the law. As His Honour, Justice EW Thomas stated:

‘A change along these lines would not be merely semantic. It would reflect a shift in emphasis from bare or negative consent to mutuality and more directly focus the jury’s attention on that issue. Moreover, it would enable the Judge to direct the jury in terms which would be inappropriate at present’.⁹

The reforms would achieve the result that the jury would no longer look for proof of refusal of a presumed consent, but for evidence that agreement was not positively communicated. To understand the implications of this change one need only consider how evidence that the complainant had remained passive or did not physically resist would be constructed under the proposed reform. It could not be used, as it currently is, to provide an evidentiary foundation for proof of consent as constituted by absence of dissent. Instead, a complainant’s passivity would constitute evidence that consent had not been affirmatively communicated, and it would, therefore, support the inference that the required free agreement did not exist.

Another positive aspect of the proposed Tasmanian reform is that it would reinforce the approach observed in a number of cases where trial judges stressed that submission is not to be equated with consent and that violence is not a necessary component of rape.¹⁰ Clearly, the trial judges in these cases were attempting to deal with possible misconceptions that juries might have concerning what does and does not constitute a valid consent and what does and does not constitute rape. To some extent these judges were engaged in a ‘myth-dispelling’ exercise, trying to refute notions that reluctant acquiescence might be viewed as consent and that unless the will of the complainant has been overcome by violence, she cannot have been raped. The proposed reforms will enhance trial judges’ efforts in this regard and place them on a formal footing as the approach to be applied in all cases.

For these reasons, the current report recommends that the reforms contained in the Criminal Code Amendment Bill 1999 (Tas), s4(a) and (g) be enacted in their present form.

5.2 Circumstances Vitiating Consent

The present study found that the vitiating circumstance under s2A relied upon most frequently in the prosecution of sexual offences was that consent had been obtained by physical force. In only one case encountered in the present study was consent said to have been vitiated on grounds other than those provided in s2A.

The broad reading that was given to the meaning of the term ‘fraud of any kind’ in s2A(1)(a) in the case where this matter arose for consideration in the present study, suggests that the controversial, restrictive common law interpretation of ‘fraud’ in cases like *Mobilio* may have been effectively ousted by, or will not be applied to, the current Code provision. If this is so, then it will be unnecessary to incorporate into s2A specific provisions to cover the type of situation that arose in *Mobilio*, that is, misrepresentation as to the nature of and reason for medical procedures. Specific provisions of this kind have been enacted in other Australian jurisdictions.¹¹

In contrast, the same optimism cannot be felt where the interpretation of s2A(2)(b) is concerned – consent vitiated where the complainant is overborne by the nature or position of the accused. The Tasmanian Court of Criminal Appeal adopted a narrow view of this

⁹ The Hon. Justice EW Thomas, (1994) *supra* p 429.

¹⁰ See paras 4.2.1 and 4.3.2.

¹¹ See *Criminal Code* 1993 (NT), s192(f); *Crimes (Rape) Act* 1991 (Vic), s36(g); *Crimes Act* 1900 (NSW), s61R(2)(a1).

provision in *Crisp* and its interpretation in all but one of the cases encountered in the present study was similarly restrictive. Specifically, this provision has been viewed as applying only where the complainant does not appreciate that she can refuse to comply with the accused's demands or where the accused's demands are accompanied by overbearing conduct or threats of such a nature as to rob the complainant of any real choice. However, in the most recent case where this provision arose for consideration, a broad view was taken of its operation. There the trial judge looked simply at the position of the accused and its potentially, inherently coercive features vis-a-vis the complainant. His analysis focussed on how the accused could exploit his position, because of those inherently coercive features, to obtain the complainant's compliance.

It is submitted that the approach taken by the trial judge in this case accords with the legislative intent for s2A(2)(b). The narrow approach taken in *Crisp* and the other cases detailed in this study gives no independent operation to s2A(2)(b) beyond the rationality requirement in s2A(1) or the requirement in s2A(2)(a) that consent not be obtained by force or threats of any kind. At the present time, it is uncertain whether the broad reading of s2A(2)(b) will survive on appeal.

The findings of the present study suggest that there would be merit in including in s2A of the *Criminal Code* a broader range of non-inclusive circumstances that vitiate consent than is currently provided. Providing a broader list would serve the useful function of expanding current conceptions and understandings of the circumstances that can involve non-consensual sexual impositions.

If enacted, s4(a) of the Criminal Code Amendment Bill 1999 (Tas) will expand the list of circumstances in s2A of the *Criminal Code* where free agreement does not exist. The amended list includes force or the fear of force to the complainant or another person; a threat to use extortion; unlawful detention; being overborne by the nature or position of another person; fraud; mistake as to the nature of the act or the identity of another person; being asleep; unconscious or incapacitated by alcohol or drugs; and, being incapable of understanding the nature of the act. This is a broad list, but not as broad as that provided in the Australian Capital Territory legislation which also includes the abuse of a position of authority, or of a professional position or other position of trust in relation to the complainant and, additionally, the physical or mental harassment of the complainant.¹²

It is submitted that the Australian Capital Territory provision with respect to abuse of a position is to be preferred to the Tasmanian provision relating to the complainant being overborne by the nature or position of the accused. It is quite clearly not limited, as the Tasmanian provision may be, to situations where the complainant has no understanding of, or ability to, exercise his or her right to refuse consent. It also encompasses social situations and relationships possibly not covered by the Tasmanian provision, including professional relationships, such as doctor/patient relationships, teacher/student relationships and even lawyer/client relationships as well as positions of trust and authority like parent/child relationships, employer/employee relationships and custodian relationships.

This report supports the provision of an expanded list of circumstances such as is contained in s4(a) of the Criminal Code Amendment Bill 1999 (Tas). However, it also recommended that that list be further amended along the lines of the s92P(h) *Crimes Act* 1900 (ACT). Specifically, it is suggested that the provision in the Tasmanian legislation that a person does not freely agree where he or she agrees or submits because he or she is overborne by the nature or position of another person, be replaced by a provision that

¹² *Crimes Act* 1900 (ACT), s 92P(d) and (h).

a person does not freely agree if their agreement or submission is caused by the abuse by another person of his or her position of authority over, or professional or other trust in relation to, the person. Additionally, it is recommended that mental and physical harassment be included in the list of vitiating circumstances.

5.3 Mistaken Belief in Consent

In 12 trials in the present study the accused relied upon the defence of mistaken belief in consent in the alternative to asserting that the complainant had consented. In a further eight cases the trial judges left the defence of mistaken belief in consent to the jury even though it had not been specifically relied upon as part of the defence case. In only five of the trials where the defence of mistaken belief in consent was in issue was there any evidence that the accused had taken any positive steps to obtain or ascertain complainants' consent. This reinforces the earlier finding that the criminal law, in form and operation, does not currently reflect the view that sexual encounters involve mutual obligations with regard to the communication of desires and agreement. Instead, the responsibilities are all one way. The complainant is required to convey her refusal of consent unequivocally and forcefully. The accused is entitled to presume that consent exists until the complainant communicates her reluctance or refusal to the requisite degree, whatever that is. This is problematic because determination of what is 'the requisite degree' of communicated rejection inevitably involves value judgments that are susceptible to wayward notions about what is normal sexual behaviour for men and women.

The defence of mistaken belief is also problematic on other grounds. For example, there is the problem of how it could have been reasonable for an accused to believe that the complainant was consenting to sex where a jury finds beyond reasonable doubt that consent was not in fact present. Further, there is the problem of categorising what occurred where the accused is acquitted because he believed what happened was consensual sex while for the complainant, it was rape. This problem has been stated most clearly by Dr Lynn Jamieson:

'...if a woman believes what is occurring is rape and the man does not, then, in law it is, indeed, not rape. Having ruled that no crime has occurred, the law does not have to answer the question, "what is it then, if it is not rape?" or "if it is not rape, is it consensual sex?"'¹³

There is also the question, 'why is it not rape?' Why is it acceptable for someone to make such a grave and invasive physical imposition upon another and avoid liability on the grounds that he made a mistake, that he did not take sufficient care, that he did not sufficiently care for the other person's physical integrity or feelings to take action to avoid any mistake? How can mistakes about another person's willingness to have sex ever be genuinely reasonable? The basis of such mistakes must lie in unchecked assumptions about the other person's behaviour or in generally-applied, but also unverified, assumptions about everyone's sexual behaviour. In other words, they must arise from inadequate communication with the other person. This is the nub of the problem concerning the defence of mistaken belief in consent— it reinforces the lack of mutuality required by the criminal law for sexual encounters. In its current form the law permits inadequate communication and failure to take mutual responsibility for ensuring consent either to be regarded as reasonable behaviour or to be ignored in determining whether the accused should be acquitted on the grounds of his mistaken belief.

One possible remedy for this deficiency lies in imposing upon an accused the duty to take reasonable steps to verify the existence of consent as a precondition to reliance on the defence of mistake. The Criminal Code Amendment Bill 1999 (Tas) contains provision to this

¹³ L. Jamieson, (1996) *supra* pp 55–73.

effect.¹⁴ This reform is a logical concomitant of the proposed reforms to the law relating to consent. It reinforces the communication standard and mutuality of obligation in relation to communication sought to be established by those reforms. Moreover, it reaffirms the view that passivity, lack of resistance or lack of response should not by themselves be regarded as constituting consent.

It is further submitted that this reform is a necessary adjunct to the reforms to consent contained in the Bill. It enables full effect to be given to the new definition of consent and to the directions that trial judges are mandated to give juries in relation to consent. One of the weaknesses of the Victorian law upon which the amendments relating to consent in the Criminal Code Amendment Bill 1999 (Tas) are based is that the Victorian law does not completely tackle the problem that passivity may be equated by an accused with consent. This is because the Victorian law retains a subjective mental element for the crime of rape and a subjective test for the defence of mistaken belief in consent. Consequently, even if the jury finds that the complainant was non-responsive and, therefore, did not give free agreement to sexual intercourse with the accused, it may, nevertheless, be found that the accused may have honestly interpreted her lack of resistance as agreement. The Victorian accused's mistaken belief in consent does not have to be a reasonable belief or based upon reasonable steps that he has taken to ascertain consent. It simply has to be honest and may, therefore, be unreasonable.

This reform does not of course deal with all the problems that have been raised in relation to the defence of mistaken belief in consent. Nevertheless, it does reinforce and enable full effect to be given to the proposed reforms relating to consent.

Accordingly, it is recommended that the amendments contained in s4(b) of the Criminal Code Amendment Bill 1999 (Tas) (version 2) be enacted.

One solution that would solve all the problems that have been detailed here lies in abolishing the defence of mistaken belief in consent where sexual offences are concerned. This would mean that the crime of rape would be complete on proof that penetration had occurred without free agreement. It is acknowledged that such a reform would be considered radical and strongly resisted in some quarters. Nevertheless, it has been suggested as a serious possibility by His Honour Justice EW Thomas.¹⁵ It is, therefore, suggested that this matter should now be placed upon the agenda for serious debate.

The principal justification for such a reform is that it gives full effect to the view that sexual encounters necessarily involve equal obligations and equal rights. This view of sexual relations is that it is not acceptable or reasonable for one person to be mistaken about another person's willingness to engage in sexual activity. Respect for other individuals demands that there be no such mistake. The defence of mistaken belief in consent, however couched, on a subjective or an objective test, represents a view that ignorance of another person's wishes where intimate sexual contact is concerned is a permissible basis on which to conduct a sexual encounter. The point has been made on a number of occasions that the law serves a powerful educational and symbolic function.¹⁶ Consequently permitting a person charged with rape to be exonerated on the grounds that he did not take care to ascertain with certainty that there was free agreement, communicates the wrong message to the community. A

¹⁴ Section 4(b).

¹⁵ (1994) *supra* at p 430.

¹⁶ See for example, K Warner, (1994) 'The Implications of Victim Oriented Developments in the Criminal Justice System for Female Victims', paper presented to the 8th International Symposium on Victimology, Adelaide, Australia, 21-26 August 1994; L Jamieson, (1996) *supra* pp 55-73.

number of commentators have noted that it 'prioritises male perceptions over women's experiences'¹⁷ and 'bolsters macho masculinity at the expense of all women and some men far beyond the courtroom.'¹⁸

The arguments promulgated by Jennifer Temkin¹⁹ with respect to the desirability of abandoning the subjective test for mistake where sexual offences are concerned apply with equal force to the proposition that the defence of mistake should be abandoned altogether for these offences. To paraphrase Temkin's arguments: it is possible for a man to ascertain whether a woman is consenting with minimal effort. She is there next to him. He only has to ask. To have sexual intercourse with her without her consent is to do her great harm. Accordingly, to require him to inquire carefully into consent and to take careful notice of what is said, is neither unjust nor particularly onerous. A mistaken understanding in this context is easily avoided and untenable.

Accordingly, it is recommended that the question of abolition of the defence of mistaken belief in consent in sexual offences cases be placed upon the public agenda for debate.

5.4 Further Observations and Recommendations

The trial judges' summations examined in the present study did not contain the type of infelicitous remarks documented in the Senate Standing Committee Report, *Gender Bias and the Judiciary*²⁰ that have given rise to community concerns that trial judges may be out of touch with modern views concerning appropriate sexual conduct. In addition, clear attempts were observed in a number of cases by trial judges to disabuse jurors of possibly stereotyped and legally incorrect views they might hold concerning what constitutes real rape. In one case, the trial judge went so far as to tell the jury that despite some mainland judicial pronouncements to the contrary, 'no means no'. Nevertheless, the view remains current that passivity or lack of resistance may constitute evidence of consent or provide a foundation for a mistaken belief in consent. In addition, the view has not been entirely discarded that reluctant acquiescence may constitute consent.

The present study found that in a number of cases, trial judges' summations to the jury did not directly relate relevant evidence in the case to the law. Instead, the trial judges tended to explain the law to the jury, to summarise the evidence for the Crown and the defence but not to relate the latter to the former in any detailed fashion. This style of summation was particularly noted in those cases where the defence of mistaken belief in consent was left to the jury by reference to the entirety of the evidence rather than by reference to evidence considered to have particular or specific relevance to this matter. As noted earlier, the problem with this approach is that it may provide insufficient guidance to the jury and may be more confusing than enlightening. It also begs the question whether it adequately discharges the trial judge's responsibilities with respect to summing up as set down by the High Court in *Alford v Magee*.

A related problem arising in these cases is that it was not clear from the summations that the trial judges had left the defence of mistaken belief in consent to the jury on a sufficient evidentiary foundation. In some of these cases it appeared that the defence was left as a matter of generally applied judicial practice. This approach conflicts with that of the Court of Criminal Appeal in *Ingram* and *Dalwood*. It is submitted that the approach now followed in

¹⁷ K Warner, (1994) *ibid.*, p 5.

¹⁸ L Jamieson, (1996) *supra* p. 68.

¹⁹ J Temkin, (1983) 'The Limits of Reckless Rape', *Criminal Law Review*, January, pp 5-16, at pp 15-16.

²⁰ Senate Standing Committee on Legal and Constitutional Affairs, (1994) *Gender Bias and the Judiciary*, Canberra: Commonwealth of Australia.

Canadian cases is to be preferred and that the defence of mistaken belief in consent should only be left to the jury where there is a clear preliminary determination by the trial judge that evidence exists which lends 'an air of reality to the defence'.²¹

It is submitted that these problems may be ameliorated to some extent by the enactment of the reform contained in s4(b) of the Criminal Code Amendment Bill 1999 (Tas) (version 2) which limits the availability of the defence of mistaken belief in consent. This reform will have the practical effect of requiring the trial judge, as a preliminary matter, to determine the question of whether the accused took reasonable steps to ascertain consent. This should exclude the possibility for this defence to be left to the jury as a matter of practice without reference to its evidentiary foundation. It should also achieve the result that trial judges will consider in greater detail in summing up, specific evidence that bears upon the defence of mistake.

Accordingly, Recommendation Number 3 above is reiterated here.

²¹ *R v Esau* [1997] 2 S.C.R. 120; *R v Osolin* [1993] 4 S.C.R. 595; *R v Ewanchuk* (1999) 131 C.C.C. 481.

Chapter One: Introduction

1. Introduction

This report is the second in a series of reports monitoring the operation of the 1987 reforms to the *Criminal Code* 1924 (Tas) and the *Evidence Act* 1910 (Tas). The purpose of the present study is to examine, in the context of sexual offences trials, the operation of the reforms to the definition of 'consent' in the Tasmanian *Criminal Code* 1924. This report also presents findings on the operation of the defence of mistaken belief in consent in these trials.

The old and current definitions of consent are considered in Chapter One of the Report. In addition, in this chapter, the background to the 1987 reform is discussed and the defence of mistaken belief in consent under s14 of the *Criminal Code* is dealt with. Chapter Two details the research methodology employed in the study and sets out basic quantitative findings with respect to the sexual offences tried and the lines of defence encountered. In this chapter the impact of key factors upon trial outcomes is also considered. In Chapter Three, the research findings concerning the Crown construction of non-consent and the key themes and strategies employed by the defence to refute the Crown allegations of non-consent, to construct sexual contact as consensual and to lay a foundation for the defence of mistaken belief in consent are set out and discussed. Chapter Four relates and discusses the study's findings concerning trial judges' summations to juries on the issues of consent and mistake. Implications of the research findings for future developments of the law are considered throughout Chapters Three and Four. Chapter Five sets out the study's conclusions and recommendations.

1.1 Background to the 1987 Reform

1.1.1 Consent

The current definition of 'consent' is contained in s 2A of the *Criminal Code* 1924 (Tas). This provides:

'2A(1) In the code, unless the contrary intention appears, a reference to consent means a reference to a consent which is freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which the consent is given.

(2) Without limiting the meaning that may otherwise be attributable to the expression "freely given", a consent is freely given where –

(a) it is not procured by force, fraud or threats of any kind;

(b) it is not procured by reason of the person being overborne by the nature or position of another person; or

(c) it is not given by a person so affected by liquor or drugs, or so otherwise affected, as to be incapable of forming a rational opinion upon the matter to which the consent is given.

(3) Where a person, against whom a crime is alleged to have been committed under Chapters XIV or XX, suffers grievous bodily harm as a result of, or in connection with, such a crime, the grievous bodily harm so suffered is *prima facie* evidence of the lack of consent on the part of that person.'

This section replaced a previous section that read:

"Consent" means a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents. A consent is said to be freely given when it is not procured by force, fraud or threats of whatever nature.'

The major difference between the 1987 reform and the old provision is that s2A contains an expanded list of circumstances in which consent is said not to meet the statutory requirement of being 'freely given'. The old section listed only fraud, force and threats as obviating consent. The current provision also includes the overbearing of the victim's will by reason of the nature or position of another person and the incapacity of the victim to consent as a result of alcohol or drug induced intoxication. In addition, in subsection (3) the current provision creates a presumption that consent does not exist where there is evidence that grievous bodily harm was sustained by the complainant.

When the Bill enacting the reform was introduced to the Tasmanian Parliament it was described as providing,

'the most effective means of dealing with all situations of non-consensual sexual intercourse'.²²

The then Attorney General, the Hon. John Bennett, also stated that the reform aimed to indicate the abhorrence with which sexual offences are regarded by the community and to achieve a balance between the rights of the accused and the rights of complainants.²³ This was best achieved, in the view of the Government of the day, by enacting only minor amendments to the existing law of consent. The reform, therefore, did not affect the substance of the previous provision relating to consent and retained lack of consent as the essence of most sexual offences.²⁴ In this respect it departed from the recommendations that had been made by the Law Reform Commission of Tasmania in its report on rape and sexual offences.²⁵ The Commission had recommended the enactment of a non-exhaustive list of objective circumstances that, if present, would establish absence of full and free consent. The object of this recommendation was to alter the emphasis upon the issue of consent in sexual offences trials, to redirect attention away from the accused's perceptions of the complainant's state of mind and characteristics and to focus attention instead upon objective factors of the accused's behaviour. This, it was hoped, would ameliorate many of the problems faced by complainants in testifying. In particular, it was argued that the practice of challenging the sexual conduct and personal integrity of the complainant would no longer necessarily comprise a major component of defence strategy.²⁶ The Commission also suggested that the recommended reform would avoid problems associated with a vague and generalised definition of consent, which was felt to cause confusion and to enable the exoneration of the accused in many situations of sexual contact that women would regard as non-consensual.²⁷

The list of objective circumstances recommended for enactment extended beyond those contained in the final legislation. They included the threatened use of extortion, public humiliation, disgrace or physical or mental harassment, fraudulent misrepresentation of some fact, abuse of a position of authority or of a professional or other trust and unlawful detention of the complainant. The desire of those recommending the broader list of vitiating circumstances was to maximise the protection afforded by the law to women's sexual autonomy by extending the recognition of non-consensual sexual conduct beyond traditional conceptions with their emphasis upon physical violence, the infliction of serious injury or the fear of it, to other behaviours with non-consensual implications for women, such as economic

²² Hansard, 15 April 1987, House of Assembly, p 1490.

²³ Ibid., p 1487.

²⁴ Ibid., pp 1488-1489.

²⁵ Law Reform Commission of Tasmania (1982) *Report No. 31: Report and Recommendations on Rape and Sexual Offences*, Hobart: Tasmanian Government Printer, pp 14-16.

²⁶ Ibid., p 16.

²⁷ Ibid.

pressure, blackmail and deceit.²⁸ A concomitant aim was to eliminate often distorted and overly narrow judicial interpretations of lack of consent.²⁹

The Tasmanian Government declined to adopt the Law Reform Commission's approach because it was felt that the wide but general definition of consent enacted by the 1987 reform, in fact, covered the circumstances included in the Commission's list. The Attorney General also agreed with the legal community's comment upon the recommended list that it amounted to nothing more than examples of the type of evidence that the prosecution would adduce under existing law to demonstrate absence of consent. Further, it was considered that the recommended list would not achieve its intended aim of reducing the trial focus upon the issue of consent but, instead, would complicate and prolong trials.³⁰

The reform that was enacted reflects a conservative approach to the question of consent. No definition of consent in the orthodox or strict sense of the term is provided by the reform. That is, it does not tackle the question of consent in conceptual terms. Instead it prescribes the particular quality that qualifies a person's consent as a valid consent for the purposes of the criminal law. The consent must be 'freely' given. The legislation then lists specific circumstances that preclude that quality from being present – force, fraud, threats etc. The list is not exhaustive, but it does indicate what kind of 'pressures are sufficient to nullify consent'.³¹ It may be, therefore, that a number of the factors nullifying consent that the Law Reform Commission sought to have included in the legislation might not be regarded, under the present law, as sufficient to negate consent.³² The 1987 reform also retained the law's existing emphasis upon the complainant's capacity to consent. The focus of the inquiry is, therefore, upon the circumstances of the consent and the complainant's capacity to consent rather than upon the concept of consent itself. In this regard it is instructive to compare the 1987 Tasmanian reform with that enacted in the *Crimes (Rape) Act* 1991 (Vic) and with the definition of consent enacted in the Northern Territory *Criminal Code*. Section 36 of the Victorian Act and s192(1) of the *Criminal Code* (NT) provide that 'consent' means 'free agreement.' This definition has been described as investing the term 'consent' with elements of mutuality and reciprocity in a more definite way than is achieved in statutory regimes like the *Tasmanian Criminal Code* which do not define consent in conceptual terms.³³ In addition, it alerts the jury more emphatically to the fact that consent 'involves something more than mere submission, a failure to resist, or grudging and tearful acquiescence'.³⁴

The 1987 reform process discloses the two essentially opposing views of consent that are still current today.³⁵ On the one hand there is the view that the seriousness of sexual offences requires that they be confined to a relatively few, uncontroversial circumstances of non-consent. According to this view, enabling a wider range of circumstances to negate consent potentially devalues the currency of these offences. It is argued that it would extend the reach of the criminal law to relatively inconsequential behaviour which, though possibly immoral,

²⁸ CA Warner, (1981) *Working Paper on Rape Law Reform*, Hobart: Law Reform Commission of Tasmania, pp. 24 - 29.

²⁹ Ibid, p. 28.

³⁰ Hansard, 15 April 1987, supra pp 1488-1489.

³¹ G Williams, (1983) *Textbook of Criminal Law*, London: Stephens, p 551.

³² B McSherry, (1998) supra; The Hon. Justice EW Thomas (1994) supra; C Boyle, (1994) supra; RL West, (1993) supra; V Waye, (1992) supra.

³³ B McSherry, (1998), supra; The Hon. Justice EW Thomas (1994), supra.

³⁴ D Brereton, (1994) 'Real Rape, Law Reform and the Role of Research: The Evolution of the Victorian Crimes Act 1991' *The Australian and New Zealand Journal of Criminology*, vol 27, pp. 74-94, at p 76.

³⁵ The opposing views concerning the proper scope of consent are summarised in the Model Criminal Code *Discussion Paper on Sexual Offences Against the Person*, 1996, pp 53-57.

should not be regarded as criminal.³⁶ On the other hand, there is the view that there is no valid reason for distinguishing between different cases of non-consent. The argument here is that wherever sexual contact occurs without genuine consent, the particular reason for that lack of consent cannot alter its absence. It is also suggested that failure to acknowledge that this is so has led the courts to create or adhere to untenable distinctions and exceptions that bring the law and criminal justice process into disrepute. The much-criticised decision of the Victorian Court of Criminal Appeal in *Mobilio*³⁷ is pointed to as an example of the problematic results that the conservative approach can produce.³⁸

1.1.2 Withdrawal of Consent

Also relevant to the consideration of consent in sexual offences cases is the definition of 'sexual intercourse' provided in the Code. This term is defined in s1 as:

'...The penetration to the least degree of the vagina, genitalia, anus or mouth by the penis and includes the continuation of sexual intercourse after such penetration'.

Where the issue of consent is concerned, the effect of this provision is to extend the crime of rape to the situation where there is consent to the initial penetration but no consent, or the withdrawal of consent, to the continued act of sexual intercourse. This provision was also introduced in 1987³⁹ to replace an earlier definition whose effect had been to limit the crime of rape to situations where there was no consent to the initial penetration.⁴⁰ Continuation of sexual intercourse after withdrawal of consent had constituted indecent assault only.⁴¹

1.2 Reported and Unreported Judgments of the Tasmanian Courts Concerning the Interpretation of s2A Criminal Code 1924 (Tas)

1.2.1 Section 2A(1): 'a rational and sober person so situated as to be able to form a rational opinion upon the matter to which the consent is given'

The meaning of 'rational' in this context was considered by Crisp J. in *Schell*⁴² and by Crawford J. in *Roden*.⁴³ In *Schell*, evidence was given for the Crown by a psychiatrist that the complainant was feeble-minded although not an imbecile. On this basis, the Crown alleged absence of consent by reason of the complainant's mental retardation. Crisp J held:

'I think myself that that (the psychiatrist's opinion of what constitutes rational behaviour) is applying far too high a standard, in that it suggests or requires an overlay or appreciation of moral and social issues which is not necessary under the Code for a consent to be a rational consent. I cannot accept such a requirement as according with my understanding of what the Code would require. I don't want it to be thought that I'm merely approaching this as a matter of arguing with the psychologist. Obviously, whatever I think about it, his opinion must be given very great weight. But I return to what is the central core of this problem, that is the consent – what the nature of consent is to be and that is only a consent to the physical act. She

³⁶ D Stuart, (1993) 'The Pendulum Has Been Pushed Too Far', *University of New Brunswick Law Journal*, vol 42, pp 349-356; J Temkin, (1982) 'Towards a Modern Law of Rape', *Modern Law Review*, vol 45, p. 399, at p 411; I Cunliffe, (1984) *Criminal Law Journal*, vol 8, 271, at p 281; DA Dripps, (1992) 'Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent', *Columbia Law Review*, vol 92, pp. 1780-1809.

³⁷ (1990) 50 A.Crim.R. 170.

³⁸ J McInness and C Boyle (1995) 'Judging Sexual Assault Law', *University of British Columbia Law Review*, vol 29, pp 341 – 381; C Boyle, (1994) *supra*; RL West, (1993) *supra*; V Wayne, (1992) *supra*; Thomas, The Hon Justice EW, (1991) *supra*.
Criminal Code Amendment (Sexual Offences) Act (Tas) 1987.

⁴⁰ The earlier definition was of the term 'carnal knowledge' and provided: "carnal knowledge" means penetration to any the least degree of the organ alleged to have been known by the male organ of generation'.

⁴¹ *Richardson* [1978] Tas S.R. 178.

⁴² [1964] Tas S.R. 184 at 185. This case was decided under the former definition.

⁴³ (1981) 4 A.Crim.R. 166. Like *Schell*, this case was decided under the former definition of consent but is equally applicable to the new definition.

does not have to understand in my view of the law the consequences – social, moral or biological – of the act for it to be a rational consent to it. As I say, in the words of the High Court,⁴⁴ all she has to know is what is being done to her and who is doing it, and the psychologist has said that in his view she would understand the character of the act, know what it meant – that is to say, she would appreciate that what was going to happen would be the insertion of a male organ into herself’.

In *Roden* the Court was required to consider the capacity of a five-year-old child to give a valid consent. The Crown argument was that absence of consent could be established in three ways. First, the child was too young to understand that what the accused proposed to do involved a physical act of penetration; second that she was too young to understand the sexual significance of his act, and third, that she did not understand that she was entitled to refuse to obey the accused. Crawford J. accepted all three submissions stating:

‘Obviously, if the girl did not comprehend that penetration of her by the accused’s penis was proposed or that it was just about to happen, then, of course, she was not consenting. That would not be consent, if she did not comprehend what was happening at the moment of first penetration. It would not be a consent if she was so young that she was so lacking in experience and information and for those reasons she had no understanding that the act of penetration which took place, if you find it took place, was one of sexual connection, as distinct from an act of a totally different character. If she had no understanding that sexuality was involved and she could not distinguish between the sexuality of an act and a different act such as a cleaning, say a finger or part of a hand going into her as part of a cleaning, a cleansing by a parent, or as part of a medical examination by a doctor, where in neither case, of course, sexuality would be involved. I repeat, that if you are satisfied beyond reasonable doubt that the girl was so young and so lacking in experience that she had no understanding that the act of penetration was one of a sexual connection as distinct from an act of totally different but an innocent character, you could be satisfied beyond reasonable doubt that she did not consent.

‘Thirdly, it would not be a consent if you were satisfied beyond reasonable doubt that she, because she was situated the way she was, that is to say, if her step-father who perhaps she regarded as her father, came into her bedroom as he did and she did not appreciate that she could consent or refuse because she was expected to obey her step-father. If she was so young and so situated that she was not able to appreciate whether she could consent or otherwise, because this was her step-father, so that she believed that she must obey without question and therefore was not able either to consent or refuse – if you are satisfied beyond reasonable doubt of that – than that would mean there would be no consent’.

The term ‘sober’ in s2A has not been considered in any reported or unreported judgments. However, it is difficult to see what operation it can have independent of s2A(2)(c) which provides that a consent is not freely given where it is procured by reason of the person being so affected by alcohol or drugs or so otherwise affected as to be incapable of forming a rational opinion upon the matter to which consent is given. Both parts of s2A deal with the relationship of insobriety to the issue of consent in terms of the complainant’s capacity to form a rational opinion. The test they prescribe requires proof that the complainant was not capable of rational thought. Under neither aspect of s2A would the complainant’s consent be vitiated just because her judgment was affected by alcohol or drug consumption in a way that merely reduced her normal inhibitions.

1.2.2 Section 2A(2)(a): ‘fraud of any kind’

Section 2A(2)(a) has not resolved the conflict in judicial authority about the type of fraud that will vitiate consent in the context of sexual offences. If the High Court decision in *Papadimitropoulos* applies, as was held by Crisp J. in *Schell*, then only fraud as to the

⁴⁴ His Honour is referring here to the High Court decision in *Papadimitropoulos* (1957) 98 C.L.R. 249.

character of the act or identity of the perpetrator will vitiate consent. There is, however, other authority to the effect that any fraud that procures consent will vitiate it: *Hurst*⁴⁵ and *Woolley v Fitzgerald*.⁴⁶

The controversy surrounding this issue has been reanimated in recent years as a result of the Victorian Court of Criminal Appeal decision in *Mobilio*⁴⁷ where it was held that provided the complainant consents to the act of penetration, and the particular act of penetration that occurs is physically the same as that to which she consented, her consent will not be vitiated by the fact that the penetration is performed for an ulterior purpose or for a reason other than that which induced her consent in the first place. Accordingly, in this case it was held that the complainant's consent to penetration by a transducer was not vitiated by the fact that she thought that it was being done for a legitimate medical purpose whereas it was, in fact, done solely for the sexual gratification of the accused. It is unclear, on the present reported and unreported case law, whether this approach would be followed in Tasmania, whether it is mandated by previous decisions or whether it can be avoided by adopting an interpretation of s2A that ousts the operation of the common law.

1.2.3 Section 2A(2)(a): 'force or threats of any kind'

It is unsettled precisely what types of threats and force are encompassed in s2A(2)(a). For example, do the words 'threats of any kind' extend to blackmail or to threats of public humiliation or financial harm? Or are they limited to threats of immediate physical harm? To date the matter has not been finally determined by any Tasmanian court. There has been some indication in one case, however, that 'threats' in this section would be interpreted as extending to conduct other than physical harm. In *R. v. G.*,⁴⁸ Green CJ Stated:

'To say to a woman that if she does not submit to sexual intercourse, video tapes of her having sexual intercourse would be published would plainly be a threat and any subsequent act of sexual intercourse induced by it could well be rape'.

Clearly, the approach taken in this case acknowledges that threats of harm other than physical harm are encompassed within the meaning of 'threats of any kind'. This approach opens the way to other types of threat being recognised as possibly vitiating consent, threats of economic harm for example, threats by an employer to sack an employee, or threats to cut off financial support to an economic dependent.

Where force is concerned the difficult question that arises is how much force is necessary to vitiate consent? Is force never consistent with consent or are some kinds or levels of force concordant with seduction and, therefore, consent. If force is never consistent with consent, what are the policy and legislative implications of saying so? If some force is compatible with consent, what practical consequences follow from that? Does it mean that only a high level of physical force or force resulting in actual physical injury is sufficient to negative consent, while lesser forms of force remain acceptable?

1.2.4 Section 2A(2)(b): 'overborne by the nature or position of another person'

At the time that this provision was inserted into the definition of consent in the Code it was felt that it would go some way towards acknowledging the power imbalances that constrain numbers of women to submit to unwanted sexual contact, including those inherent in social

⁴⁵ Unreported 18th June 1960.

⁴⁶ [1969] Tas S.R. 65. Both *Hurst* and *Woolley v Fitzgerald* were decided under the former definition of consent. However, the 1987 definition is, if anything, broader than the old definition where fraud is concerned. Accordingly, these cases are still relevant.

⁴⁷ (1990) 50 A.Crim.R. 170.

⁴⁸ Unreported Judgment of the Tasmanian Criminal Court, serial number 47/1993.

relationships of economic and familial dependency and professional trust and those intrinsic to institutional contexts.

The ambit of this provision, however, remains to be definitively determined. In *Crisp*⁴⁹, the Tasmanian Court of Criminal Appeal gave it a very narrow reading, essentially adopting the same approach to this provision as had Crawford J. in *Roden* in relation to the question of a young child's ability to form a rational opinion on the matter to be consented to. Cox J. in *Crisp* analysed the complainant's consent in terms of whether she believed that she had an obligation to submit or understood that she had a right to refuse. On this basis he held that there was insufficient evidence to leave to the jury that the complainant had not consented at different times when she was aged between ten and 13 to sexual intercourse with her foster father. The complainant had testified that she was worried that if she did not consent, the accused would abandon her as had her mother. She also gave evidence that the accused told her that if she did not consent he would get aches and pains, that he was crying and that she felt sorry for him.

Delivering the judgment of the Court, Cox J held:

'When the only evidence of lack of consent consists of inferences to be drawn from the testimony set out above of a thirteen year old girl with no apparent mental limitations who does not claim in the witness box to have submitted to intercourse unwillingly through fear of consequences or through a feeling of obligation in the circumstances, but who, in essence, merely asserts that after an initial refusal she had intercourse with the appellant because he cried and said he would get aches and pains, and because she felt sorry for him, and that after five minutes she pushed him away with her legs, the quality of that evidence is such that in my view no jury could reasonably convict on the materials before them'.

The approach taken in this case appears largely to subsume the operation of s2A(2)(b) into the rationality requirement in s2A(1). At least, where young girls are concerned, it seems to give little independent operation to s2A(2)(b) beyond the scope of s2A(1).

1.2.5 Section 2A(2)(c): 'so affected by liquor or drugs...as to be incapable of forming a rational opinion on the matter to which consent is given'

This provision locates the question of consent in the capacity of the complainant to make a rational decision. It vitiates consent only in cases where the complainant's insobriety is of such a degree as to rob her of the capacity for rational thought. Anything less will not render her consent invalid under this provision. An example of a case where s2A(2)(c) was held to apply is *O'Brien*.⁵⁰ Here the Court of Criminal Appeal accepted that the complainant was 'so befuddled by liquor, marijuana or head injuries sustained in a fall at Kirksway House, or a combination of all three, that she was unable to make a rational decision about consent'. Arguably this conceptualises incapacity to consent in wider terms than was done by Crisp J. in *Schell* where it was held that to have the capacity to consent the complainant need only understand what was being done to her and who was doing it.⁵¹

1.3 Mistake

In *Snow*,⁵² the Tasmanian Court of Criminal Appeal recognised that the defence of mistake under s14 of the Tasmanian Code provides a defence to sexual offences where the accused honestly and reasonably, but mistakenly, believed that the complainant was consenting to sexual contact. Unlike the common law defence of mistake, the Code defence requires not

⁴⁹ Unreported Judgment of the Tasmanian Court of Criminal Appeal, serial number 74/1990

⁵⁰ Unreported Judgment of the Tasmanian Court of Criminal Appeal, serial number 83/1996.

⁵¹ [1964] Tas S.R. 184 at 190. This case concerned the capacity of a complainant who was described as feeble-minded though not an imbecile.

⁵² [1962] Tas S.R. 271.

only that the accused's belief in consent be honestly held, but also that it be reasonably held. The question of what is reasonable is judged according to the jury's perceptions and standards. Since the decision in *Brown*,⁵³ the onus of proof in relation to this defence has rested with the Crown and the standard of proof is beyond reasonable doubt. The decision in *Brown* over-ruled the earlier Tasmanian Court of Criminal Appeal decision in *Martin*,⁵⁴ which had assigned the onus of proving a mistaken belief to the accused on the balance of probabilities. The Court of Criminal Appeal in *Brown* reassigned the onus to the Crown following the High Court decision in *He Kaw Teh*.⁵⁵

⁵³ Unreported Judgment of the Tasmanian Court of Criminal Appeal, serial number 7/1990.
⁵⁴ [1963] Tas S.R. 103.
⁵⁵ (1985) 157 C.L.R. 523.

Chapter Two: Research Design and Key Quantitative Findings

2.1 Research Design and Methodology

The study involved a quantitative and a qualitative analysis of all contested cases of rape, aggravated sexual assault, indecent assault, unlawful sexual intercourse with a young person, maintaining a sexual relationship with a young person and attempts to commit these crimes that were tried in the Tasmanian Criminal Court during the period 1995 to a cut off point midway through 1999.

Transcripts for these trials were obtained from the Supreme Court of Tasmania transcribing service. Data obtained from these transcripts was supplemented by information obtained from the case files of the Tasmanian Director of Public Prosecutions.

Information from the transcripts and the Director of Public Prosecution's files was coded using Claris Filemaker Pro, a computer software package which enables the standardised recording, sorting, matching, retrieval and simple quantification of data. A content analysis of the trial transcripts was also undertaken using Atlasti, a software package designed to accommodate large amounts of qualitative data and to provide consistency in the organisation and retrieval of such data and in the identification of patterns and selected factors in large volumes of written material.

The coding undertaken using Claris Filemaker Pro was based largely on the coding booklet developed for similar research conducted in New South Wales and Victoria and designed originally by the Law Reform Commission of Victoria for research undertaken on its rape reference in 1991.⁵⁶ This original instrument was modified for the present study to take account of differences in the law between Tasmania and these jurisdictions. The aim in using this research instrument was to maintain as high a level of consistency as possible between the present study and the New South Wales and Victorian studies in order to enable inter-jurisdictional comparison of the results.

2.2 Analysis

Because this study focused upon the conduct of sexual offences trials, how the criminal law relating to consent and mistaken belief in consent is dealt with and operates in these trials, the basic unit of research for this study was the trial. This approach accords with that adopted in the recent New South Wales study, *Heroines of Fortitude*.⁵⁷ It means that where a case was tried twice, either because the accused successfully appealed his conviction at the first trial and a retrial was ordered or because the jury returned a hung verdict at the first trial, the first and subsequent trials were included as separate items in the data set. Nevertheless, it was also necessary to analyse some of the data by reference to the complainants, the accused and the incidents being tried. For example, demographic details about complainants and accused were dealt with according to individual complainants and accused in order to accommodate the fact that some trials involved more than one complainant or accused and also in recognition of the fact that some accused were tried more than once in respect of the same

⁵⁶ Law Reform Commission of Victoria (1991) *Report Number 43: Rape: Reform of Law and Procedure*; Department for Women, New South Wales, (1996) *Heroines of Fortitude*, Sydney: Dept. For Women; M Heenan, and H McKelvie, (1997) *The Crimes (Rape) Act 1991: An Evaluation Report*, Melbourne: Attorney-General's Legislation and Policy Branch Department of Justice.

⁵⁷ Department for Women, New South Wales, (1996), *Ibid*.

offence. In the latter case, it was important that the demographic data concerning complainants and accused and aspects of the offences was not counted more than once.

The transcripts from 55 trials were examined and coded in the present study. This number exceeded that which it was originally projected would be included in the study. The original estimate was that approximately 30 to 35 sexual assault cases would be dealt with during the period of the study. Additional cases were able to be included in the study because data collection commenced earlier than anticipated enabling the period for data collection to be extended.

Five of the trials examined involved multiple accused, five accused were tried more than once in respect of the same offences and two accused stood trial twice in respect of different offences committed against different complainants. In total, 51 individual accused were tried during the period of the study. In the majority of trials there was only one complainant. However, one trial involved four complainants, three cases involving one complainant were tried twice and one case, also involving one complainant, was tried three times.

2.3 Identification of Lines of Defence

The lines of defence relied upon by the accused and the way that they were constructed in individual cases were identified from counsels' opening and closing addresses, from the trial judges' summations to the jury and from the examination-in-chief and cross-examination of the complainant and the accused.

The main lines of defence available to an accused charged with one or more of the offences included in the study were:

- denial of contact with the complainant at the time the offence occurred, that is, denial that the accused was the perpetrator;
- admission of contact with the complainant but denial of any sexual contact or of any unlawful sexual contact as, for example, where the accused masturbated in front of the complainant or she masturbated him without any threat of force or actual application of force to her. This type of conduct is not currently prohibited by the Tasmanian *Criminal Code*;
- admission of sexual contact, but denial of penetration;
- assertion that the complainant consented to the sexual contact;
- assertion that he honestly and reasonably, but mistakenly believed that the complainant consented to the sexual contact;
- assertion that the event complained of by the complainant never occurred, that is, that the complainant's allegations were a complete fabrication in all respects.

Additionally, in relation to indecent assault, the accused could also contend:

- that the contact that occurred was not indecent;
- that the contact with the complainant was not intentional within the meaning of the Code or that the contact was accidental.

Additionally, in relation to attempted rape, the accused could assert:

- that he had made no attempt to penetrate the victim, or
- that he did not have the prescribed mental element for the offence, that is, that he did not intend to penetrate the victim without her consent. For example, the accused might

contend that he hoped to persuade the complainant to consent and that his actions had gone no further than that.

It was found that in those cases where the accused claimed that he was not the perpetrator of the offence(s) charged, this was the sole line of defence relied upon and it was readily identifiable from the transcripts. However, in other cases, the accused might adopt more than one line of defence. This occurred particularly in cases where there were multiple counts of the one offence or several counts of different sexual offences. In such cases, a combination of defences might be relied upon with the accused claiming, for example, that the complainant consented to some of the sexual contact in question and that she had fabricated allegations in relation to other offences. In some cases the accused relied primarily upon a claim that the complainant consented to sexual intercourse, but constructed that defence in such a way that the alternative defence of mistaken belief in consent was also open on the facts. The final decision about how to categorise the lines of defence relied upon was made by reference to counsels' addresses and, most importantly, by reference to the trial judges' summations and the defence(s) identified there as being available to the accused. For the purpose of the present study it was decided not to adopt the approach of the Victorian research⁵⁸ and attempt to identify only the main line of defence relied upon by the accused in each trial. This approach presents potential pitfalls of misclassification. Accordingly, where more than one line of defence was identified in a trial, all were recorded.

2.4 Charges Tried

Table 1 sets out details of the sexual offences dealt with in the trials included in this study. It shows that a majority of the sexual offences trials during the period of the study dealt with charges of rape and indecent assault. The figures in Table 1 show the number of trials where the particular offences were dealt with, not the number of charges for each category of offence tried.

Table 1: Offences

Offence	Number of trials	% of trials
Rape	38	69
Indecent assault	25	45
Aggravated sexual assault	11	20
Attempted rape	13	24
Maintaining sexual relationship with a young person	6	11
Sexual intercourse with a young person	2	4

2.5 Lines of Defence - Frequency

Table 2 shows the frequency with which different lines of defence were relied upon or emerged in the trials studied. Table 3 then shows the frequency with which consent and mistaken belief in consent were relied upon in relation to particular offences.

Overall, the Crown was required to prove absence of consent, either as an element of the offence(s) charged or because consent comprised a defence available in law to the accused, in 44 trials. In only 32 (73%) of these trials, however, did the accused rely upon the defence of

⁵⁸ M Heenan and H McKelvie (1997) *supra*; Law Reform Commission of Victoria (1991) *Report No 42: Rape: Reform of Law and Procedure*.

consent. It is important to note that consent and mistaken belief in consent do not always provide defences to charges of indecent assault, aggravated sexual assault, sexual intercourse with a young person and maintaining a sexual relationship with a young person. In some cases, the complainant is precluded by reason of her age from giving a lawful consent.⁵⁹ Accordingly, for these offences the figures given in Table 3 relate only to the number of cases where these defences were available to the accused and not excluded by age restrictions on consent. Column 2 of Table 3 sets out the number of trials where the defence of consent was available in law to the accused. Predictably, consent and mistaken belief in consent were not available defences in any case of sexual intercourse with a young person. Accordingly, this offence is omitted from Table 3.

Unlike the Victorian research,⁶⁰ the present inquiry made no attempt to classify the cases where mistake and/or consent were relied upon according to whether consent alone, consent in combination with mistake or mistake alone was relied upon. Classification in this way can be problematic.⁶¹ Instead, the present study has simply recorded the number of cases where consent was relied upon or left to the jury regardless of whether it was relied upon alone or in combination with mistake and, similarly, for mistake, the number of cases where that defence was left to the jury have been recorded without further sub-classification. The study's adoption of this approach was supported by the fact that in no case included in the study was mistake relied upon as the sole line of defence. It was invariably, relied upon in conjunction with and as an alternative to consent.

In eight of the 20 cases where the defence of mistaken belief in consent was left to the jury, it had not comprised an explicit part of the defence case. The accused in these cases maintained that sexual contact had occurred with the complainants' consent and did not resort to mistake as a defence in the alternative. The defence was, nevertheless, left to the jury by the trial judge. In the remaining 12 cases, where this defence was left to the jury it was specifically relied upon as part of the defence case, in the alternative to consent.

⁵⁹ The age restrictions on consent are set out in s124(3) *Criminal Code* (Tas). This section provides: "The consent of a person against whom a crime is alleged to have been committed under this section (ie sexual intercourse with a young person) is a defence to such a charge only where, at the time the offence was alleged to have been committed –

that person was of or above the age of 15 years and the accused person was not more than five years older than that person; or

that person was of or above the age of 12 years and the accused person was not more than three years older than that person.

This restriction also applies to indecent assault, (s127(3)), to aggravated sexual assault, (127A(3)) and to maintaining a sexual relationship with a young person, (s125A(1)).

⁶⁰ M Heenan and H McKelvie, (1997) *supra*; Law Reform Commission of Victoria (1991) *Report No 42*, *supra*.

⁶¹ J Gans, (1997) 'Rape Trial Studies: Handle With Care', *The Australian and New Zealand Journal of Criminology*, vol 30, no 1, pp 26-35.

Table 2: Lines of Defence

Defences (to all offences in study)	Number of trials	% of trials
Consent	32	58
Mistaken belief in consent	20	36
Admitted contact, denied sexual contact	19	35
Admitted sexual contact, denied penetration	6	11
Fabrication of entire event	5	9
Denied contact (wrong identification)	4	7

Additionally Re: Indecent Assault & Maintaining a Sexual Relationship with a Young Person

Contact not indecent	1	2
Contact accidental or non-intentional	2	4

Additionally Re: Attempted Rape

No attempt to penetrate	5	9
No intention to penetrate without consent	3	5

Table 3: Consent and Mistake

Offence	Trials where consent and mistake were available	Consent		Mistake	
		Number of trials where consent was relied on	% for particular offence	Number of trials where mistake was relied on	% for particular offence
Rape	38	29	76	20	53
Aggravated sexual assault	6	5	83	3	50
Indecent assault	14	10	71	5	36
Attempted rape	13	10	77	3	23
Maintaining sexual relationship with young person	1	0	0	0	0

It is clear from Tables 2 and 3 that, with the exception of the offence of maintaining a sexual relationship with a young person, where consent was available as a defence in law to the accused, it was relied upon in the overwhelming majority of trials. Because relatively few cases of maintaining a sexual relationship with a young person were tried during the period of

the present study, it is not presently possible to gauge accurately what operation consent and mistaken belief in consent will have in relation to that offence.

With regard to rape, attempted rape and aggravated sexual assault a larger proportion of accused in this study claimed that the complainant had consented to the sexual activity than in either of the Victorian studies which have examined analogous offences in that jurisdiction. In the original Victorian study, which looked at rape, attempted rape, rape in aggravating circumstances and assault with intent to rape, consent was relied upon, either alone or in combination with mistaken belief in consent, in 67% of cases.⁶² In the second Victorian study which examined the same offences, though with a reformed definition of rape that now encompasses conduct analogous to aggravated sexual assault under the Tasmanian Code, consent was relied upon either alone or with mistake in 49.2% of cases.⁶³ In contrast, in the Tasmanian study, the accused maintained that the complainant consented to the sexual activity in over 76% of trials dealing with rape and attempted rape. With respect to aggravated sexual assault, consent was relied upon in excess of 80% of trials where that defence was available, but overall in only 45.5% of trials of this offence.

Mistaken belief in consent appeared as a defence less frequently than consent although it still made a significant appearance in rape trials, being left to the jury in 53% of these trials. In comparison, both Victorian studies found that mistake was relied upon in relatively few cases. Overall, it was identified as a significant line of defence in only 23% of cases.⁶⁴ This difference may be due to the fact that when analysing the frequency with which particular defences were relied upon, both Victorian studies identified the main lines of defence adopted by the accused and did not identify, as did the present study, all the defences that emerged at trial.

2.6 Factors impacting on Trial Outcomes

To maintain consistency between the present study and analyses conducted in New South Wales and Victoria, the researchers investigated the extent to which particular factors appeared to influence jury decisions. The analysis here is descriptive. It looks only at trends in the data and does not attempt to appraise whether those trends are significant in statistical terms. The specific factors examined here largely included those identified in the Victorian studies as influencing trial outcomes: the presence and nature of physical injuries, the use of a weapon, the relationship between the complainant and the accused, the lines of defence employed by the accused, whether the accused made admissions prior to trial and whether the accused testified at trial.

However, because the focus in this report is upon the question of consent, the present analysis also went beyond the Victorian work by extending the list of factors evaluated to include evidence of violent behaviour on the part of the accused; whether there were prior consenting sexual relations between the complainant and the accused; and the response of the complainant to the sexual attack, that is whether she resisted and how. In addition, when examining the impact on trial outcomes of whether the accused testified, the researchers also investigated whether those accused who did testify were questioned about whether and how they had ascertained that complainants were consenting to sexual contact. Here the particular concern was to learn whether accused were questioned about measures that they may have taken to ascertain consent. Of equal interest was the extent to which assertions that

⁶² Law Reform Commission of Victoria (1991) *Report No 42*, supra pp 86-91.

⁶³ M Heenan and H McKelvie, (1997) supra pp 191-192.

⁶⁴ Law Reform Commission of Victoria (1991), *Report No 42*, supra pp 86-91; M Heenan and H McKelvie, (1997) *ibid*.

complainants had consented were based upon explicit attempts by accused to verify that this was the case or, alternatively, upon inferences that they had drawn from complainants' body language, demeanour or conduct. Accordingly, the list of factors examined in this part of the analysis is:

- the lines of defence employed by the accused;
- the presence and nature of physical injuries;
- whether the accused behaved violently;
- whether a weapon was involved in the attack;
- the relationship between the complainant and the accused;
- whether prior consenting sex had occurred between the complainant and the accused;
- the complainants' response during the assault, whether she resisted or remained passive;
- whether the accused made admissions prior to trial;
- whether the accused testified.

2.6.1 Summary of trial outcomes

Table 3a sets out the outcomes for all trials in the study. It shows that in 23 (42%) of the 55 trials that occurred during the period of the study the accused were convicted of all sexual offences charged. In a further seven trials (13%) the accused were convicted of some of the sexual offences charged and in one trial the jury convicted the accused of one charge of aggravated sexual assault but returned a hung verdict on the remaining charge of indecent assault. This gives a total of 31 trials (56%) where the accused were convicted of some or all of the sexual offences tried. In 16 trials (29%) there were full acquittals and in six trials (11%), hung verdicts were returned on all the sexual offences charged. In two trials the accused were acquitted of one count of rape and the jury returned hung verdicts on the remaining counts. This means that in a total of nine trials (16%) the juries returned hung verdicts on some or all counts in the indictment. In five trials, the juries acquitted the accused or returned hung verdicts in respect of some or all of the sexual offences charged but convicted the accused of a non-sexual offence involving violence committed on the same occasion as the alleged sexual offences. In two of these cases there were convictions for aggravated burglary. In two other cases, the convictions were for assault and in the remaining case, the accused was convicted of aggravated assault.

Table 3a: Outcomes For All Trials

Verdict	Number of trials	% of trials
Guilty all sexual offences	23	42
Guilty some sexual offences	7	13
Guilty + hung verdicts	1	2
Acquittal all sexual offences	16	29
Acquittals + hung verdicts	2	4
Hung verdicts all counts	6	11
Acquitted/hung verdicts on sexual offences + guilty non-sexual offence	5	9

2.6.2 The lines of defence employed by the accused

The study examined whether any distinct trends were observable in the outcomes of cases according to the lines of defence relied upon by the accused. Table 4 sets out the results of this analysis. It shows the number of trials where, when the different lines of defence were relied upon by the accused, the following verdicts were returned: guilty of some or all the sexual offences charged, acquitted of all sexual offences counts, hung verdicts on all sexual offences and hung verdicts in combination with acquittals. These numbers are also expressed as percentages of the total number of trials where the particular line of defence was relied upon.

Table 4 reveals that accused tended to be convicted of some or all offences charged at a greater rate in those trials where the lines of defence were a denial of contact with the complainant, a denial of sexual contact or penetration or the allegation that the complainant had fabricated the entire event. These lines of defence, therefore, seem to be weaker than either consent or mistaken belief in consent. As far as consent and mistaken belief in consent are concerned, there did not appear to be a marked difference between the complete acquittal rates for these two lines of defence. However, there tended to be a lower rate of convictions and a higher rate of hung verdicts in cases where mistaken belief in consent was left to the jury. In a quarter of those cases where consent was the defence, the jury was unable to make up its mind as to the guilt or innocence of the accused with respect to the sexual offences charged. The percentage of hung verdicts increased to 35% in those cases where mistaken belief in consent was also left to the jury.

There were no observable trends in the rate at which different verdicts were returned according to whether the defence of mistaken belief in consent was explicitly relied upon by the accused or whether it was simply left as a possible defence by the trial judge. For example, in two of the five cases where mistaken belief in consent was in issue and the accused were acquitted of all sexual offences charged, the trial judge had left this defence to the jury of his own motion. In the remaining three cases where the accused were acquitted on all counts, this defence was explicitly relied upon by the accused. In three of the seven cases where mistake was left to the jury and where the accused were convicted of some or all sexual offences charged, the trial judge had left this defence to the jury of his own motion. In the remaining four cases where convictions were returned, the accused had explicitly relied upon this defence in the alternative to consent.

Different patterns emerged in those cases where hung verdicts were returned on some or all counts of the sexual offences charged. In three of the four cases where hung verdicts were returned on all counts of sexual offences charged, mistaken belief in consent had been specifically relied upon as part of the defence case. In the remaining case in this category, the trial judge alone had raised the possibility of this defence with the jury. In both cases where hung verdicts were returned on some charges and the accused were acquitted of the remainder, the trial judge had raised the defence of mistaken belief in consent without it having been relied upon by the defence.

The rate at which hung verdicts were returned in trials is a matter of some concern. Hung verdicts are of concern because it is important that trials end in a result. Where there is a hung verdict, the jury is essentially saying that it cannot see its way through the morass of evidence and issues to reach a decision either way. It is important to all involved, the complainants, the accused and the courts, that trials not end in a state of indeterminacy. Retrials are expensive. The delay they incur can cause unfairness and injustice to both complainants and accused. Moreover, complainants may not have the fortitude to withstand the stress of more than one trial. For this reason, the entire case may lapse at the stage when a hung verdict is returned. This means that the accused has received a *de facto* acquittal even though that has not been the actual jury decision. In two cases tried during the time of the present study, the Crown filed a *nolle prosequi* after the jury returned hung verdicts in respect of some or all the sexual offences tried.

The relatively high percentage of indeterminate outcomes in cases where mistaken belief in consent, in particular, was relied upon, raises the possibility that this defence, as it currently operates, impedes the jury decision making process. It may be that it operates in a confusing manner for juries. Alternatively, it may operate so as to enable jurors to avoid confronting the central issue of culpability. That is, the defence of mistake may provide the means by which jurors reconcile themselves to a contradictory position of believing the complainant and yet not wanting to convict the accused. If this is the case, then the defence of mistake is functioning to let both the accused and the jury off the hook. These problems are explored further in the discussion of the trial judges' summations on the issue of mistake in Chapters Four and Five.

Table 4: Outcomes for Lines of Defence

Defences (to all offences in study)	Guilty of some or all counts	Not guilty all counts	Hung verdict on all counts	Hung on some & not guilty on rest
Consent	15 47%	9 28%	6 19%	2 6%
Mistaken belief in consent	8 40%	5 25%	5 25%	2 10%
Denied sexual contact or unlawful sexual contact	11 58%	7 37%	0	1 5%
Denied penetration	4 66.6%	1 16.6%	1 16.6%	0
Fabrication of entire event	4 80%	1 20%	0	0
Denied contact (wrong identification)	3 75%	1 25%	0	0

2.6.3 Evidence of physical injury

In no case examined in the present study was there evidence that the complainant had sustained grievous bodily harm such as might activate the operation of s2A(3) of the *Criminal Code* and constitute prima facie evidence of lack of consent. Accordingly, this section played no role in terms of trial outcome in any trial in the present study. Nevertheless, evidence of injury might reasonably be expected to provide quite cogent objective evidence of non-consent. Accordingly, as well as looking at the impact of evidence of physical injury on the outcomes of all cases in the study, the outcomes in those cases where consent was in issue were examined separately.

The Crown adduced evidence that the complainant had suffered physical injury as a result of the sexual encounter with the accused in 33 trials. In one other case, the Crown adduced evidence that the accused had injured the complainant's de facto spouse, though not the complainant. In all but one of these cases, the Crown was required to prove that the complainant had not consented to sexual contact with the accused. Tables 5a and 5b show that the acquittal rate was slightly higher in those trials where there was either no evidence of injury or evidence only of minor injury than it was in those cases where there was evidence of medium-level or serious injury. In only one of the nine cases involving medium-level injury was the accused acquitted of all charges. In all of these cases, consent was in issue. In comparison, in seven of the 23 cases where there was evidence of only minor injury, there were full acquittals. In six of these cases the Crown was required to disprove consent. Similarly, of the 21 trials where there was no evidence of injury, eight resulted in full

acquittals. In three of these cases the defence of consent was available to the accused. In the two cases where there was evidence of serious injury, the accused were convicted of the majority of the offences charged. In both of these cases, the Crown was required to prove the absence of consent. In one of these cases, the injury was inflicted upon the complainant's de facto spouse.

While apparently useful, evidence of injury was neither sufficient nor necessary to gain a conviction for sexual-assault charges. For example, in three cases where there was evidence of medium-level injury and in five cases where there was evidence of minor injuries, the jury returned hung verdicts. In 13 cases, eight of which involved the issue of consent, the accused were convicted of some or all of the charges in the indictment despite there being no evidence of injury adduced at trial. In relation to this last finding, however, it is important to note that in all but two of these cases, the Crown adduced evidence of physical violence, threats or the use of a weapon.

Table 5a: Evidence of physical injury – impact on outcome, all trials

Nature of injury	Number of cases	Guilty of some or all	Complete acquittal	Hung verdict
Nil	21	13	8	0
Minor	23	11	7	5
Medium	9	5	1	3
Serious	2	2	0	0

Table 5b: Evidence of physical injury – impact on outcome, trials where consent was in issue

Nature of injury	Number of cases	Guilty of some or all	Complete acquittal	Hung verdict
Nil	11	8	3	0
Minor	22	11	6	5
Medium	9	5	1	3
Serious	2	2	0	0

2.6.4 Evidence of violence

Overall, evidence of violent behaviour on the part of the accused, before or during the commission of the offence, was adduced by the Crown in 34 of the trials (62%) in the present study. In 33 of these trials, the Crown was required to prove absence of consent in relation to some or all of the counts in the indictment. In a total of five trials where evidence of violence was adduced, there were full acquittals. All these trials involved the issue of consent. In 21 trials involving evidence of violence, the accused were convicted of some or all of the sexual offences charged. In 20 of these trials, the Crown was required to prove that the complainant had not consented to sexual contact. In six trials, all of which involved the issue of consent, the juries returned hung verdicts on all sexual offences charges and in two, both raising issues of consent, the juries acquitted the accused on some counts but returned hung verdicts on the remainder.

In 17 of the 20 trials where mistaken belief in consent was left to the jury as a defence available to the accused, there was evidence that the accused had behaved violently. In six of these cases the accused were convicted on some or all counts of sexual offences charged. In four, there were complete acquittals, in five the juries returned hung verdicts on all counts and in two, they returned hung verdicts on the majority of the offences charged whilst acquitting the accused of the remainder.

The level of violence in those cases where acquittals and hung verdicts were returned was not insubstantial. For example, in one case the accused had pointed a loaded rifle at the complainant's head then fired close to the left side of her face into the chair on which she was sitting. The jury convicted the accused of one count of aggravated assault, but acquitted him of one count of rape and returned hung verdicts on four remaining sexual-assault charges. When this matter was retried, the jury convicted the accused on all outstanding counts.

In another case, the accused strangled the complainant, applying such pressure to her throat that she sustained sub-conjunctival haemorrhaging and a nosebleed. At the first trial of this case, the jury returned hung verdicts on all counts. When retried, the accused was convicted. In a third case, the accused had forced his way into the complainant's house and held a knife to her throat. He was acquitted of rape but convicted of aggravated burglary. In a fourth case, the accused had abducted the complainant at gunpoint and threatened to kill her. The jury returned hung verdicts on two charges of rape but convicted the accused of one count of aggravated assault. In another case, three accused had abducted the complainant, threatened her with a knife and kicked her and bashed her into unconsciousness. This case involved three trials, with the first jury convicting all accused of some of the offences charged. Following a successful appeal by the accused, the jury in the second trial returned hung verdicts on all counts. In a third trial of two of the accused the jury returned guilty verdicts on a reduced number of charges. The third accused was not retried because the complainant was unwilling to testify at a fourth trial.

These cases demonstrate that evidence of high levels of violence does not necessarily persuade juries that sexual contact between the complainant and the accused was non-consensual or that the accused could not honestly and reasonably have been mistaken about the complainant's consent. In those cases where the juries convicted the accused of other offences involving violence, such as aggravated assault or aggravated burglary, committed on the same occasion as the alleged sexual assaults, the juries' failure to convict the accused of the sexual offences cannot be ascribed simply to their rejection of the evidence of violence. There are a number of possible explanations, of course, for the different verdicts for the sexual and non-sexual offences, including, for example, the possibility that some jurors may have considered conviction on some counts only to be an adequate reflection of the accuseds' overall culpability. Nevertheless, such cases do raise the concern that sexual encounters under the current law may occur in coercive circumstances and yet, nonetheless, still be considered to be consensual.

While the s2A(2)(a) of the Code states that a forced consent is not a freely given consent, cases such as these raise the possibility that some juries are reluctant to give full effect to this provision. As a result they may not treat sexual intercourse that occurs in circumstances of coercion as necessarily non-consensual. This approach, if it does exist, would reflect what one commentator has described as an 'archetypal male model [of sexual relations] where a male predator overcomes the passive female whose resistance is against her better interests'.⁶⁵ This model sees sex and violence as interconnected. It views violence or force, perhaps within limits, albeit, ill-defined limits, as an acceptable part of the seduction process. Its

⁶⁵ S Lees, (1997) *Ruling Passions: Sexual Violence, Reputation and the Law*, Ballmoor, Bucks: Open University Press, p 77.

application in sexual offences trials would require the words of s2A(2)(a) of the *Criminal Code* to be interpreted as sanctioning some coercion as possible seduction.

Another possible explanation is that juries may view the accused's violent conduct and the complainant's consent as disconnected. This approach involves treating the time of consent as isolated from any preceding violence and perceives the freedom with which the consent was finally given to be separable from the overall context of violence in which it was obtained. This construction of the facts was put forward by the defence in a number of trials in the present study. It is illustrated by the following extract taken from the cross-examination in one trial where the accused was charged with multiple counts of rape, aggravated assault, and assault. The Crown case in this trial was that the complainant had been threatened with a loaded gun over a period of approximately 18 hours and tormented by the accused with descriptions of her impending murder and of the means he intended to use to disguise it. It was alleged that during the course of this on-going ordeal the accused raped the complainant five times. When first tried for these offences, the accused was convicted of the charge of aggravated assault constituted by firing a loaded gun towards the complainant's head. He was acquitted on one count of rape and hung verdicts were returned in relation to four other counts of rape.

Defence counsel, in cross-examining the complainant, attempted to extract agreement from her to the proposition that the accused's violent behaviour had ceased by the time that sexual intercourse occurred, that her fear of him had by then abated and that his previous violence did not then exercise any influence upon her and that, in fact, she initiated the acts of sexual intercourse:

Defence counsel: 'See, Miss G, I've got to suggest to you that those two acts were the only two acts of intercourse that occurred during the whole time he was with you that night and the next day. There were only two and they were it?'

Complainant: 'No, it wasn't.'

Defence counsel: 'And that you prompted those. You were responsible for those two acts yourself?'

Complainant: 'No, I wasn't.'

Defence counsel: 'That you invited him to participate in the oral sex and you took the lead in that?'

Complainant: 'No.'

Defence counsel: 'And that you were absolutely responsible in regard to the vaginal intercourse?'

Complainant: 'No, I wasn't.'

Defence counsel: 'And that by that time whatever had happened in the scuffle with the rifle hours earlier, that was totally behind you both?'

Complainant: 'No. Nothing had changed.'

Defence counsel: 'Nothing had changed?'

Complainant: 'No.'

Defence counsel: 'And, I want to suggest, that a closeness had existed in the hour or so preceding these acts of intercourse between the two of you?'

Complainant: 'No, there hadn't.'

Defence counsel: 'When you'd cuddled and kissed and, in effect, made up?'

Complainant: 'No'.⁶⁶

2.6.5 Weapons

Conventionally, the use of a weapon by an accused is thought to provide cogent support for the complainant's account and particularly, the complainant's assertion of non-consensual sexual contact with the accused. Overall, in 16 trials, in all of which consent was in issue, and in six trials where the defence of mistaken belief in consent was left to the jury the Crown adduced evidence that the accused had used a weapon. However, like both Victorian studies, the present investigation found that the involvement of a weapon did not guarantee conviction.⁶⁷ In two trials where the accused were alleged to have used weapons, they were acquitted of all sexual offences tried. In one of these cases, however, the accused was convicted of aggravated burglary. In a further three trials the jury returned hung verdicts on all sexual offences counts. However, in one of these cases the accused was convicted of one count of aggravated burglary. In one other trial, the jury convicted the accused of aggravated assault but acquitted him of one count of rape and returned hung verdicts on another four counts of rape. When this case was retried the jury convicted the accused of all remaining counts. In another seven trials, the accused were convicted of all charges and in a further two they were convicted of some charges and acquitted of the remainder.

A puzzling feature of three of the cases mentioned here is the apparent reluctance of juries to convict the accused of the sexual offences charged when they were prepared to convict them of a non-sexual offence involving the use of a weapon. The juries in these cases do not appear to have viewed the accused's use of the weapon as part of the continuous fabric of the entire event. It seems that the accused's earlier use of the weapon or its mere continued presence at the time of the offences without some additional element of force also being applied, may not be considered to be sufficiently coercive to establish the non-consensual nature of the sexual contact that occurred. The following extract from the cross-examination of one complainant demonstrates this type of thinking:

Defence counsel: 'The gun's on the floor?'

Complainant: 'Yeah.'

Defence counsel: 'So what did you do?'

Complainant: 'I did what he told me to do.'

...

Defence counsel: 'He didn't force your head onto his penis?'

Complainant: 'No.'

Defence counsel: 'Or any part of his body?'

Complainant: 'No.'

Defence counsel: 'He didn't grab your hair?'

Complainant: 'No.'

Defence counsel: 'Didn't do anything of that sort with his hand?'

Complainant: 'No.'

Defence counsel: 'You're saying are you, you complied with that wish out of fear that he'd pick up the gun and shoot you if you didn't?'

⁶⁶ Case number 26 in the present study. All trials in the present study were assigned an individual identification number. In this report, the trials are referred to by this identification number.

⁶⁷ Law Reform Commission of Victoria (1991) *Report No 42* supra p 96; M Heenan and H McKelvie, (1997) supra p. 235.

Complainant: 'Yeah.'

Defence counsel: 'That's just not so I'd suggest. I suggest that you voluntarily and readily and indeed of your own volition had oral sex with him that night?'

Complainant: 'No, I didn't.'

...

Defence counsel: 'So what you are saying is that you voluntarily did it but it was out of fear of what would happen if you didn't, is that correct?'

Complainant: 'Yeah, I was just doing what he told me to do.'

...

Defence counsel: 'And why was that again? Why just do what he tells you to do?'

Complainant: 'Because of the position he was in and the position I was in, I just had to.'

Defence counsel: 'Why?'

Complainant: 'Because he had the gun next to the bed.'

Defence counsel: 'Yes. And?'

Complainant: 'And he wanted to use it, well he made it clear that he would if he had to.'

Defence counsel: 'He didn't at any stage say, "If you don't do what I tell you and you don't have sex with me I'll shoot you"?''

Complainant: 'No, didn't have to.'

Defence counsel: 'He didn't at any stage threaten what he might do with the gun if you didn't have sex with him?'

Complainant: 'No'.⁶⁸

In this case, which was also considered in para. 2.6.4 above, the accused had, earlier in the evening on which the offences were committed, pointed a rifle at the complainant and fired it, just beside her head into the chair on which she was sitting.⁶⁹ Defence counsel's cross-examination sought to treat this fact as irrelevant to later events. By concentrating on the immediate circumstances, and ignoring the earlier shooting, it impliedly asked the jury to ignore it as well and to accept that the continued presence of the gun, close to the complainant and within reach of the accused, even following such an event, did not constitute a sufficiently coercive circumstance by itself to negate consent. The implicit suggestion of the cross-examination is that, only immediate, explicit physical threats with a weapon are genuinely coercive. Using a weapon in this manner is, of course, a difficult manoeuvre to accomplish whilst having sexual intercourse with someone. Usually an accused will put any weapon he has used down in order to have sexual intercourse. This has implications for practically all sexual offences cases that involve the use of a weapon. It means that the type of construction that was brought into play in the above extract will generally be available to an accused and may gain acceptance with the jury.

2.6.6 The relationship between the complainant and the accused

Overall, in ten cases that were tried during the period of the study the accused were complete strangers to the complainant. In all these cases the Crown was required to prove that the complainant had not consented to sexual contact. In nine of these cases the accused were convicted of some or all of the offences charged. In the one remaining stranger rape case the jury returned hung verdicts in respect of all the counts in the indictment. These findings

⁶⁸ Case number 26.

⁶⁹ The accused was convicted of aggravated assault in respect of this conduct.

possibly confirm the suspicion that the conventional view of genuine rape as necessarily involving an attack by a stranger covertly influences juries' determinations of guilt.⁷⁰ In any event, these findings are on all fours with those of the two recent Victorian rape studies.⁷¹

In the majority of the remaining trials the accused were related to the complainants or were their current or former partners or friends or were otherwise known to them as acquaintances, colleagues, or in a professional or employment-related capacity. In four cases the complainants and accused had met for the first time on the night of the offences. In only one of these cases was the accused convicted of any of the counts in the indictment. In two, the accused were acquitted of all charges and in the remaining case the jury returned hung verdicts on all counts. In all these cases, the accused relied upon the defence of consent.

There was only one case tried during the period of the study where the accused was the spouse of the complainant. Again, the accused asserted that the complainant had consented to sexual contact. The accused was acquitted. In 17 other trials the accused were also related to the complainants on a familial basis. In ten of these trials the accused were convicted of some or all of the sexual offences charged. In six, the accused were acquitted on all counts and in one, the jury returned hung verdicts. In five trials the accused were the complainants' present or former de facto partners or boyfriends and, in one case, the accused was the former fiancé of the complainant. The distribution of outcomes in these cases was equally divided between three alternatives: in two trials the accused were convicted of all of the offences, in two they were acquitted of all sexual offences and in two, hung verdicts were returned. In nine trials the accused were acquaintances of the complainants and in five the complainants had considered the accused to be friends. In four of the trials where the complainants and accused were acquaintances guilty verdicts were obtained on some or all of the counts in the indictment. In two of the five trials where the complainants and accused described themselves as having been friends, the jury convicted the accused of all the offences charged. In the remaining three there were complete acquittals.

The accused in four cases had been in work related relationships with the complainants. In all of these cases, the accused were convicted of some of the sexual offences charged. In two cases the accused were in a position of professional trust vis-a-vis the complainants. One was a teacher, the other a doctor. Both accused were acquitted on all counts. In only one case was the accused classified as an old friend of the complainant's family. He was convicted.

It would, therefore, appear that, at the trial stage at least, and with the exception of those cases where the complainant and accused were complete strangers to each other, the nature of the accused/complainant relationship had little impact upon the trial outcome. It may be that at the trial stage other factors, such as the presence or absence of physical injuries or the behaviour of the complainant in response to the attack, overwhelmed the influence of the relationship variable.

2.6.7 Impact of the evidence of previous consensual sexual activity between the complainant and the accused

In only a minority of trials, 11 of the 55 examined, was evidence adduced that the complainant had had previous consensual sexual relations with the accused. In all these cases, consent was in issue. In some cases the previous sexual relationship was of short duration, involving only one or two occasions when sexual contact had occurred. In other

⁷⁰ For discussion of the possible influence on the course of the trial of so-called 'rape myths', see The Hon. Justice EW Thomas (1994) *supra* pp 427-432.

⁷¹ Law Reform Commission of Victoria (1991) *Report No 42*, *supra* p 97; M Heenan and H McKelvie, (1997) *supra* pp 233-4.

cases, the relationship was of a relatively lengthy duration involving several years' cohabitation. In only three of the trials where there was evidence of previous consensual sex between the complainant and the accused were the accused convicted of all charges. In five, the accused were acquitted of all charges and in three the jury acquitted the accused of some charges but were unable to reach a verdict on the remainder. Full convictions were obtained in one case only after two trials, with the jury in the first trial acquitting the accused of one count of rape but failing to reach a verdict on the remaining four counts of rape.

There were no common distinctive features in those cases where full convictions were obtained. For example, the length of the previous sexual relationship differed in each case, with one case involving a lengthy *de facto* relationship, one involving a boyfriend-girlfriend relationship of a few months' duration and the third involving sexual contact on only a couple of occasions in the past. Similarly, violent behaviour on the part of the accused did not set these cases apart from those where the accused was acquitted. Whilst there was evidence that the accused had behaved violently in all those cases in this category where guilty verdicts were returned, in three of the five trials resulting in full acquittals, there was also evidence that the accused had behaved violently.

Evidence of prior consenting sexual contact between the complainant and the accused is traditionally considered to be particularly relevant to the issue of mistaken belief in consent. It is, therefore, interesting to note this study's finding that in no trial where the accused was convicted on all charges and where evidence of prior consensual sexual relations between complainant and accused was adduced was the defence of mistaken belief in consent left to the jury. In contrast, mistake did feature as a defence in two trials where there were full acquittals and in two trials where the jury returned hung verdicts. Given the small number of cases involved, however, this cannot be said to constitute a trend. Nevertheless, the interest level of this feature is heightened by the fact that in that case mentioned above which was tried twice because of the jury's failure to reach a verdict on the majority of counts in the first trial, mistaken belief in consent was left as a defence by the first trial judge, but not by the judge in the second trial where guilty verdicts were obtained on all outstanding counts.

In conclusion, while it does seem that the Crown's task is more difficult in cases where there is evidence of prior consenting sexual relations between the complainant and the accused, this factor does not exclude the possibility that guilty verdicts will be returned.

2.6.8 Complainant's response during the assault

The complainant's behaviour during any alleged sexual assault is generally of central interest in sexual offences trials involving issues of consent or mistaken belief in consent. Given the negative burden of proof that rests with the Crown in relation to these issues and also given the fact that consent is presumed to exist until its absence is proved, in the majority of cases it is incumbent upon the Crown to establish that the complainant sufficiently manifested her lack of consent to the accused. In some cases, specifically those involving incapacity to consent either by reason of insufficient rationality or because of drug-induced incapacity, it may not be necessary for the Crown to supply such evidence. In other cases, failure to do so will generally mean that the Crown has not discharged its duty to negative consent to the requisite standard, or, alternatively, that the defence of mistaken belief in consent will inevitably apply.

The focus of the jury inquiry in this context is on the complainant's refusal of consent. It is not, as it would be in a civil action involving a disputed agreement, upon evidence that establishes the presence of mutual agreement. One of the consequences that flows from this is that generally, the Crown will need to be able to point to independent indicia of the

complainant's non-consent, such as physical injury. A second consequence is that the Crown will usually have to establish that the complainant behaved in a manner that would commonly be accepted as inconsistent with consent, and, in particular, that her behaviour unambiguously conveyed her non-consent to the accused.

The reverse is true as far as the defence case is concerned. Research has shown that a common feature of defence strategies is to represent the complainant's behaviour as inconsistent with absence of consent or genuine victim-hood.⁷² The same research also shows that there is a commonly held belief that genuine victims engage in sustained resistance, even to the point where they suffer injuries in the process. Accordingly, silence, passivity or non-resistance on the part of the complainant during the assault may be interpreted by the trier of fact as evidencing agreement. In contrast, in the context of commercial agreements, silence or non-responsive behaviour cannot be interpreted as consent. Commercial law requires that consent be actual and that its existence be substantiated by overt expressions of agreement.

This aspect of the process of proof is also particularly problematic because almost any evidence that the Crown adduce to rebut the primary presumption of consent is susceptible to reconstruction by the defence as consistent with consent. Further, in constructing apparently non-consenting behaviour as consistent with consent the defence may call in aid often ill-founded assumptions concerning women's sexual conduct and the behaviour of genuine sexual-assault victims. For example, evidence that the complainant physically resisted the accused or verbally rejected sexual contact, can be reinterpreted as evidence that she simply desired more vigorous persuasion, that she was 'playing hard to get', that she was not resisting hard enough to manifest genuine refusal.

The present study was particularly concerned to examine the impact of complainants' conduct during the assault upon trial outcomes, and, in particular, to assess whether lack of resistance or allegedly insufficient resistance or protest on the part of the complainant affected trial outcomes. This evaluation is, of course, limited to those cases where the accused asserted that the complainant assented to sex or that he mistakenly believed that she did.

In 22 of the 32 trials where the accused alleged consent, the complainants were cross-examined about their failure to resist or the allegedly low level of their resistance. In a little less than half of these cases (ten, 45%), the accused were convicted of some or all of the sexual offences tried. In five (23%) of these cases, the accused were acquitted on all counts. In six (27%), the jury returned hung verdicts on all counts and in one other the accused was acquitted of one count of rape but the jury failed to reach a verdict on four remaining counts.

In one other case, where the accused was charged with two counts of having attempted to rape the 15 year old complainant, the defence successfully made a no case submission on the basis that the jury could not reasonably have been satisfied that the accused knew or realised that the complainant was not consenting to sexual intercourse. The facts of this case were that on the evening of the offences, the complainant fell asleep on her sister's couch. She woke to find the accused, her sister's *de facto* partner, rubbing her thigh and stomach. The complainant was too scared to object and kept her eyes shut. The accused then rubbed her breast, pulled down her track-pants and inserted his finger in her vagina. The complainant froze and made no outward physical response. The accused kissed her thigh, licked her vagina and, a little later, tried unsuccessfully to insert his penis into her vagina. The complainant tried to move away, and the accused said, 'Shh', and told her that she would

⁷² B McSherry, (1998) *supra*; V Wayne, (1992) *supra*; S Bronitt, (1992) *supra*; L Jamieson, (1996) *supra*.

wake her sister. He then rubbed baby oil on his penis and attempted penetration again. At that point, the complainant kicked him away and he said, 'OK, I won't do it any more'.

The trial judge in explaining his decision to up-hold the no case submission said:

'There is no evidence at all that while he was trying to have intercourse with her, she said or did anything other than kicking to stop him, to indicate that she didn't want him to do what he was obviously intending to do. [Crown counsel's] submission was that, nevertheless, it would still be open to a reasonable jury to be satisfied beyond reasonable doubt that by her inaction and inertia generally he knew or must have known or adverted to the possibility that what he was doing was without her consent. Now I accept that that's a possibility that may be possibly so, but I cannot accept that a jury could reasonably conclude beyond reasonable doubt of that (sic)'.⁷³

The trial judge then directed the jury to bring in verdicts of guilty on two substituted charges of attempting to have sexual intercourse with a young person to which the accused had already entered pleas of guilty. The accused also pleaded guilty to one count of aggravated sexual assault and one count of indecent assault. Age limitations apply to the defences of consent and mistaken belief in consent in respect of all these offences. Consequently, for these offences, the Crown was not required to prove absence of consent.

It is interesting to speculate whether the decision on the no-case submission in this case would have been different had a consent provision such as that contained in s4(g) of the Criminal Code Amendment Bill 1999 (Tas) then applied under the Tasmanian *Criminal Code*. This provision precludes the equation of consent with lack of physical resistance or failure to protest and, further, it equates the lack of any positive indications of agreement with absence of consent.⁷⁴

In 15 of the 20 cases where mistaken belief in consent was in issue, the complainants were cross-examined about their lack of resistance or their insufficient resistance to the accused. In six of these cases (40%) the accused were convicted of some or all of the offences charged. In four trials there were full acquittals, in one the accused was acquitted on one count of rape and hung verdicts were returned on four remaining rape charges, and in four trials the juries returned hung verdicts on all sexual offences charged.

2.6.9 Admissions by the accused

In 18 trials there was evidence that the accused had made admissions to the police. In two of these trials, the accused admitted to having committed offences other than sexual offences but denied committing any sexual offence. Of the 18 trials where there was evidence that the accused had made admissions, only three (17%) resulted in full acquittals. In two of these cases the admissions made by the accused were to the effect that they had continued sexual

⁷³ Case number 41.

⁷⁴ Further discussion of this provision is provided in Chapters Three, Four and Five. Section 4(g) of the Criminal Code Amendment Bill 1999 (Tas) provides:

'In a proceedings for an offence against Chapter XIV or s185 where consent is in issue, the judge when instructing the jury as required by s371(j) must include the following direction or directions that have the same effect and substance as the following direction –

1. The victim or alleged victim is not to be regarded as having consented to the sexual act just because she or he –

(a) did not do or say anything to indicate that she or he did not consent; or

(b) did not protest or physically resist; or

(c) she or he did not sustain physical injury; or

(d) on that or an earlier occasion, consented to a sexual act of the same type as the subject of the complaint or another type with the defendant or another person.

2. The fact the victim or alleged victim did not say or do anything to indicate that she or he was consenting to the sexual act which is the subject of the complaint is normally enough to indicate that she or he did not consent'.

intercourse after the complainant had withdrawn an initial consent. In two other trials involving evidence of admissions, the accused were convicted of some of the sexual offences charged and acquitted of others and in another two trials the jury returned hung verdicts on all counts. In one trial, the jury acquitted the accused of one count of rape and returned hung verdicts in respect of three remaining counts. In the remaining ten (55.5%) cases where there was evidence of admissions, the accused were found guilty of all charges. In a total of 12 (67%) of the trials where there was evidence of admissions made by the accused, convictions were obtained on some or all counts.

In one of the two trials where there was evidence that the accused had admitted offences of a non-sexual nature, but denied committing any sexual offence, convictions on all counts were returned. In this case the accused had admitted assaulting the complainant but denied raping her. In the other case, the jury returned hung verdicts on two counts of rape, but convicted the accused of two counts of aggravated assault. He had admitted to the police that he had assaulted the complainant and also that he had committed burglary, but he had denied raping the complainant. At his trial he pleaded guilty to a burglary charge.

In 36 trials there was no evidence that the accused had made admissions to the police. Convictions were obtained at a reduced rate in these trials compared to those where there was such evidence. In 19 (53%) the accused were convicted of some or all of the sexual offences charged. Convictions in respect of all the sexual offences charged were also obtained at a reduced rate in comparison to that obtained in cases where there was evidence of admissions. In only 14 (39%) were the accused convicted of all sexual offences charged.

It is, therefore, clear that those accused who did not make admissions to the police were less likely to be convicted of all charges than those who did. Nevertheless, denial of the offences to the police or exercise of the right to remain silent was associated with complete acquittals in only a minority of trials. In only 14 (39%) of the trials where no evidence of admissions was led, were the accused acquitted of all sexual offences charged. This is a more favourable rate of complete acquittal for accused than the acquittal rate in trials where admission evidence was adduced (17%). However, it is not overwhelmingly more favourable.

2.6.10 Whether the accused testified

In relation to giving evidence at trial, accused in Tasmania now have two options— either to testify on oath or affirmation or not to testify at all. In 1995, legislation⁷⁵ was enacted that abolished the accused's right to make an unsworn statement.

In a case where an accused relies upon the defences of consent and/or mistaken belief in consent, it might reasonably be expected that a failure by the accused to testify would be likely to impact unfavourably on the jury's evaluation of the defence case. The trial judge should, of course, instruct the jury that the accused has a right to remain silent and that his exercise of that right should not be used to draw an inference of guilt.⁷⁶ Nevertheless, there remains the possibility that the credibility of the defence case will diminish in the face of an accused's failure to support it on oath or affirmation.

In the majority of trials in the present study where the accused asserted that the complainants had consented to sexual contact, the accused testified (23 out of 32 – 72%). In only five (22%) of these trials were the accused found guilty of all charges. In another five (22%), the accused were convicted of some of the sexual offences charged, giving a total of ten trials (44%) where guilty verdicts were returned on some or all of the charges. In eight trials

⁷⁵ *Evidence Act 1910 (Tas)*, s85(13).

⁷⁶ *Weissensteiner v R* (1993) 178 C.L.R. 217.

(35%), there were full acquittals and in three (13%), the jury returned hung verdicts on all counts. In a further two (9%) trials, the jury acquitted the accused on some counts and returned hung verdicts on the remaining counts. In six trials the accused did not testify. In half of these (three), guilty verdicts were returned on all counts. In one trial where the accused remained silent, he was acquitted of all charges and in one other the jury was unable to reach a verdict. In one other case that resulted in three trials there were multiple accused, only some of whom testified. Different outcomes were achieved in all three of these trials. In the first, all the accused were convicted of some of the charges in the indictment. In the second trial, the jury returned hung verdicts on all counts in respect of all accused and in the third, two of the accused were convicted on all counts. The third accused was not retried in that trial but was to be tried separately at a later date. The Crown subsequently filed *anolle prosequi* in respect of this accused and he was discharged. Taking into account the small numbers involved here, it would appear that juries are marginally more likely to accept the accused's account if he testifies in support of it.

The accused's decision to testify would seem logically to be even more critical to the trial outcome in cases where mistaken belief in consent is asserted. In such cases the jury is required to consider the accused's state of mind at the time of the offences and decide whether he both honestly and reasonably believed that the complainant consented to sex.⁷⁷ If he fails to testify, the jury has limited means of determining the veracity of this claim.

The accused testified in 13 of the 20 cases where the defence of mistaken belief in consent was left to the jury. In just four (31%) of these cases the jury returned guilty verdicts on some or all of the counts charged. In five (38%), there were complete acquittals and in two (15%), hung verdicts were returned on some counts in conjunction with acquittals on others. In two further trials the jury returned hung verdicts on all counts. In no case involving the defence of mistake where the accused exercised the right to silence was there a complete acquittal. In two trials where the accused did not testify, they were convicted on all counts, and in two other trials the juries were unable to reach verdicts on any of the sexual offences in the indictment. In one other case that eventually resulted in three trials, three accused were involved, only some of whom testified. In the first trial, the accused were convicted of some counts in the indictment. In the second trial, hung verdicts were returned on all counts and in the third trial, the two accused who were then tried were convicted on all counts. The third accused was not retried.

The analysis here suggests that in cases involving mistaken belief in consent, accused are less likely to gain a complete acquittal if they exercise their right to silence at trial.

In analysing the testimony of the accused the researchers also examined whether accused were asked, either by the defence or the Crown, what steps they had taken to ascertain that complainants were consenting to sexual contact. It was found that in a total of 17 trials the accused were questioned about this matter either by the Crown or by defence counsel. This means that in 74% of cases where the accused testified, they were asked about what they had done to ascertain that complainants were consenting and, overall, in 53% of cases where consent was in issue the accused gave evidence about this matter. In the remaining cases, the focus of questioning was exclusively upon what complainants had done to convey either their consent or non-consent. Of course, in those cases where the accused were asked about their own conduct in ascertaining consent, the complainants' conduct was also scrutinised.

In 16 of the trials where accused testified they were questioned about this matter by the Crown and in 15 trials, such questions were asked by their own counsel. In only six of those

⁷⁷ *Criminal Code* 1924 (Tas), s14.

trials where the Crown cross-examined the accused on this issue did the accused testify that they had taken any active steps to determine the complainants' state of mind, that is, that they had made some sort of inquiry. In the remaining ten cases the accused said that their understanding of the complainants' state of mind was based upon their interpretation of the complainants' conduct or body language. They did not refer to any positive steps that they had taken to verify or substantiate this matter.

The outcomes in cases where accused were questioned by the Crown about this matter were divided roughly equally between verdicts of guilty on some or all charges and complete acquittals. In eight cases the accused were found guilty on some or all counts and in seven they were acquitted of all charges. In one case the jury returned hung verdicts on all counts. In four of the cases where the accused were completely acquitted, they testified that they had taken positive steps to ascertain the complainants' consent. In the remaining three trials, the accused testified that they had inferred the complainants' consent from their conduct or body language. Roughly the same division occurred in those cases where the accused were convicted on some or all counts tried. The accused gave evidence of positive steps they had taken to ascertain consent in five cases and of inferred consent in three. Similarly, in two of those seven cases where the Crown did not question the accused about this matter, the accused were acquitted on all counts. In one the accused was acquitted of one count of rape but hung verdicts were returned in respect of four other counts. In the remaining four trials, findings of guilt were made in respect of some or all counts tried.

In 15 trials the accused were questioned by their own counsel about what they did to ascertain consent. In the majority of these cases (nine), the accused testified in response to this questioning that they had inferred the complainants' consent from their behaviour. In the remaining six, they gave evidence of explicit questions that they had asked or suggestions that they had made to the complainants in relation to their having sex. In five of those trials where defence counsel questioned the accused about what they had done to ascertain consent, the jury found the accused guilty on some or all counts, in eight the accused were acquitted on all counts and in two, the jury returned hung verdicts. The cases where there were complete acquittals were divided roughly equally in terms of whether the accused took positive steps to ascertain consent or inferred consent from the complainants' demeanour or conduct. In three of these trials, evidence falling into the former category was given by the accused and in five trials, the evidence fell into the latter category. Similar findings were made for those cases where the accused were found guilty on some or all counts. Here, there were two trials where the accused testified to having taken positive steps to ascertain consent and three where they testified to having inferred consent without having taken explicit steps in this regard.

The study found that in seven trials where the accused testified, defence counsel did not question the accused about what they had done to ascertain whether complainants were consenting. In five of these trials the accused were found guilty on some or all counts. In one, the accused was acquitted of all charges and in one other trial the accused was acquitted on one count while the jury returned a hung verdict on the remaining sexual offences charge.

In ten of the 13 cases where the accused testified and the defence of mistaken belief in consent was left to the jury, the Crown cross-examined the accused about their conduct in establishing the existence of consent. In two of these cases the accused were found guilty of some or all charges. In both, the accused testified that they had actively sought to determine that the complainants were consenting. In six trials the accused were completely acquitted and in two, hung verdicts were returned on all counts. In three of the trials where the accused were acquitted, they gave evidence of having positively attempted to verify the complainants'

consent. In the remaining three trials, the accused concluded that the complainants were consenting on the basis of their behaviour or demeanour. In both cases where the jury returned hung verdicts, the accused testified that their belief in the complainants' consent was based upon the complainants' conduct. They did not give evidence of having actively sought the complainants' consent. In three cases where the defence of mistake was left to the jury, the Crown did not cross-examine the accused about specific measures that they may have taken to ascertain consent. In one of these cases the accused was acquitted of one count of rape and hung verdicts were returned in respect of four other counts. In the remaining cases, the accused were convicted of some or all counts.

In 11 of the cases where mistaken belief in consent was left to the jury and the accused gave evidence in their own defence, they were questioned in examination-in-chief about how they had determined that the complainants were consenting. In three of these cases the accused were found guilty on some or all counts. In two of these cases they testified that they had discussed having sex with the complainants and ascertained their consent by this means. In the remaining case, the accused said that the complainant's behaviour led him to believe that she was consenting. In six trials where the accused were questioned by their own counsel about this matter, they were acquitted of all sexual offences charged. These cases were equally divided in terms of whether the accused's belief in the complainants' consent was based upon positive attempts to ascertain consent or upon inferences drawn from the complainants' actions. In the two remaining cases where the accused testified about this matter in examination-in-chief, hung verdicts were returned on all counts. In both cases the accused had inferred consent from the complainants' behaviour. In one of the cases where defence counsel did not question the accused about his conduct in ascertaining consent, the jury returned hung verdicts on four counts of rape and acquitted the accused of one further charge of rape. In the remaining case in this category, the accused was convicted on the majority of the counts charged.

Perhaps the most striking result of the analysis here is the finding that overall, in only six trials, that is 26% of trials where accused testified and 19% of trials where they asserted that complainants had consented to sexual contact, were the accused able to give evidence of any positive steps that they had taken to obtain or ascertain the complainants' consent. In only five of the trials where the accused testified and where the defence of mistaken belief in consent was left to the jury was there evidence of positive steps that had been taken by the accused to ascertain or obtain the complainants' consent.

The following extracts provide examples of the questions that were asked by the Crown and defence counsel and the answers that were given by the accused in relation to this matter. Extracts numbered 1, 2 and 3 provide examples of testimony given by accused who maintained that they had explicitly sought complainants' agreement before proceeding with sexual intercourse. Extract Number 4 contains an example of an accused's evidence that his understanding of the complainant's consent derived from her behaviour and body language.

Extract Number 1

In examination-in-chief the accused testified as follows:

Defence counsel: 'Did you say something to her?'

Accused: "'Oh, what's it my go now, is it?'"

Defence counsel: 'Did she do anything at all to indicate to you that the answer to, "is it my turn now?" was, "no, go away"?'

Accused: 'No'.

In cross-examination in this case, the following exchange occurred:

Crown counsel: 'And did you say, "my go now"?'

Accused: 'Yes.'

Crown counsel: 'Well you didn't say, "would you mind having sex"?'

Accused: 'I didn't say it no, not like that.'

Crown counsel: 'You didn't ask her did you?'

Accused: 'I said, "is it my go?" I said, "what's it my go?" and that was it'.⁷⁸

Extract Number 2

The accused's evidence in examination-in-chief on this matter was as follows:

Defence counsel: 'And perhaps you can just tell us what happened then?'

Accused: 'She laid on the bed and I sat on the end of the bed and nothing was said for a moment and then I asked her whether she wanted to suck me off.'

Defence counsel: 'How did that come to your mind?'

Accused: 'I don't know. I just ... after we had got talking and I thought there might still be a chance and because, before, when we split up, we were still having sex, I just thought that maybe ...'

Defence counsel: 'When you say, "before, when we split up we were still having sex", do you mean the first time you split up in October last year?'

Accused: 'Yes.'

Defence counsel: 'You continued to have sex for a few weeks?'

Accused: 'Yes.'

Defence counsel: 'So, you split up this time – when you asked her to perform that sexual act upon you what was your expectation that she was going to say?'

Accused: 'I wasn't sure.'

Defence counsel: 'Well, what did she say?'

Accused: 'Oh, I think she said, "no".'

Defence counsel: 'So, what did you do then?'

Accused: 'I waited a few moments and I asked her again and she said, "yes".'

In cross-examination this matter was further explored:

Crown counsel: 'And on your evidence on arriving in the bedroom you then asked her to have sexual intercourse?'

Accused: 'Yes.'

Crown counsel: 'And on your evidence at that stage she says, "no" doesn't she?'

Accused: 'Yes.'

Crown counsel: 'So, why did you persist?'

Accused: 'Well, when we did have our relationship she, sometimes she'd say, "no" and I'd ask again and she would say, "yes", so, just something we had I suppose.'

Crown counsel: 'So, at that stage in your mind you were going to persist until you got an answer, an affirmative answer, is that correct?'

Accused: 'Not really.'

Crown counsel: 'Well, what was the situation?'

Accused: 'I always ask twice and if she says, "no", then, well we'll leave it at that.'

Crown counsel: 'So, your evidence is that if she'd have said "no" a second time you would have left?'

Accused: 'Yes'.⁷⁹

Extract Number 3

The accused in this case testified in examination-in-chief as follows:

Defence counsel: 'Now, who initiated that?'

Accused: 'Oh, talked about and discussed and fairly common decision, I reckon. Well you know both of us made the decision'.

The cross-examination of this accused contained the following questions and answers:

Crown counsel: '...and might you have suddenly said, "I want to make love to you," or, "I want sex"? What did happen?'

Accused: 'Well, I don't know to be honest. I just, you know, you don't recall that sort of thing in a conversation?'

Crown counsel: 'Might you have suddenly produced your penis?'

Accused: 'And done what?'

Crown counsel: 'And flashed it at her? What did you do?'

Accused: 'If you were going to make love to somebody ...'

Crown counsel: 'I want to know what you say happened on this time, the second occasion?'

Accused: 'Well, I would have said, I would have probably talked about making love to her.'

Crown counsel: 'What do you think you probably said?'

Accused: 'Well, "could I make love to you?" or words to that effect.'

Crown counsel: 'Are you saying you did say something like that or are you saying...'

Accused: 'Well, I no doubt would have done, wouldn't I?'

...

Crown counsel: '...Just tell us things that were said.'

Accused: 'Oh, well, I can't – well, one would have asked, I suppose I would have said, "Can I make love to you?"'

Crown counsel: 'Are you saying that's the sort of thing you would say?'

Accused: 'Oh, I imagine that's the sort of thing I would have said.'

Crown counsel: 'So, is your answer that, "I said words to the effect, "Can I make love to you?"'?

Accused: 'I probably would have said that, yes.'

Crown counsel: 'And any idea, can you give us, about what sort of reply she made?'

Accused: 'Well, she wanted it. Something like that, I suppose'.⁸⁰

⁷⁹ Case number 48.

⁸⁰ Case number 10.

Extract Number 4

The accused in this case testified in examination-in-chief as follows:

Defence counsel: 'At this time did you stimulate her sexually?'

Accused: 'After I'd removed them [her pants] yeah.'

Defence counsel: 'And what did you do?'

Accused: 'I was just playing with her clit.'

Defence counsel: 'Okay. What appeared to you to be her response to that?'

Accused: 'She enjoyed it.'

Defence counsel: 'Why do you say that?'

Accused: 'Well, because she parted her legs so I could play with her a bit more.'

Defence counsel: 'Did she say anything at this point?'

Accused: 'No'.

The cross-examination of this accused contained the following questions and answers:

Crown counsel: 'Did she encourage your act of sex in any way that you can recall?'

Accused: 'I don't know mate. She parted her legs.'

Crown counsel: 'Didn't you just say you weren't sure whether she parted her legs?'

Accused: 'Well, okay, I'll rephrase that. She parted her legs. I have jumped into bed with [the complainant] on numerous occasions and we don't speak much. It's sort of like you've got to read each other's body language, you know. Ever been in that situation? No. Anyways the question was, "did she?" yes.'

Crown counsel: 'So what did she do?'

Accused: 'Well, she parted her legs.'

Crown counsel: 'Anything else?'

Accused: 'She was moving her buttocks up and down.'

Crown counsel: 'Okay, she was an active participant was she?'

Accused: 'She didn't say anything. She didn't do anything, so as far as I was concerned, yes'.⁸¹

Chapter Three: Crown Construction of Non-consent and Key Themes in Defence Construction of Consent and Mistake

3.1 Crown Construction of Non-Consent

Consent in the context of the criminal law is couched in terms of a negative burden. The onus is upon the Crown to establish that the complainant did not consent to sexual contact with the accused. In practice this means that consent is presumed to exist until the opposite is proved to the requisite standard.⁸² Accordingly, it is incumbent upon the Crown to provide independent evidence of non-consent apart from the complainant's mere assertion of it at trial. It also means that in practice, though not in law, the Crown has limited manoeuvrability in establishing absence of consent and will generally be constrained to rely upon one of the vitiating circumstances in s2A(2) to discharge its responsibility in this regard.

In 44 trials in the present study, the Crown was required to prove absence of consent.⁸³ For each of these cases the basis upon which the Crown sought to establish non-consent was recorded to determine the extent to which the statutory grounds listed in s2A of the *Criminal Code* as vitiating consent were relied upon. The particulars of the evidence adduced by the Crown to substantiate the complainant's claim of non-consent were also recorded to enable a more detailed understanding to be gained of the consent issue in the trial context. In particular, this evidence was sub-categorised to determine the existence of specific patterns in relation to the different vitiating circumstances. For example, in cases where the Crown relied upon evidence that the accused had used a weapon, the type of weapon employed was recorded. In cases where the Crown relied upon evidence of force or threats made by the accused to establish that consent had not been freely given, the type of force and the nature of the threats made were also recorded.

The rates at which the different vitiating circumstances contained in s2A were relied upon in the trials are set out in Table 6. It was found that in only one case was a factor other than a s2A factor relied upon by the Crown to establish absence of consent. Table 6 also records the frequency with which the different vitiating circumstances were relied upon by the Crown in cases where the accused specifically asserted that the complainant had consented to sexual contact. Most commonly, the Crown relied upon evidence of force or threats to prove that consent had not been freely given.

Table 7 gives the numerical findings concerning the type of force used in those cases where evidence of force was adduced. The figures in both these tables relate only to those 44 trials where the Crown was required to prove absence of consent.

⁸² Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General, (1996) *Sexual Offences Against the Person; Discussion Paper*, p 33.

⁸³ As Table 2 shows, consent was relied upon as a defence by the accused in 32 cases. Nevertheless, the Crown is required to prove absence of consent wherever that defence is available to the accused.

Table 6: Crown Construction of Non-Consent

Basis of Non-consent	Number of trials where crown was required to prove non-consent	% of trials where crown was required to prove non-consent	Trials where the defence relied upon consent	% of trials where defence was consent
Force	36	82	25	78
Threats	27	61	17	53
Overborne will	4	9	3	9
Drug induced incapacity	2	5	2	6
Fraud	1	2	1	3
Incapacity to form rational opinion	1	2	1	3
Other	1	2	1	3

3.1.1 Force**Table 7: Nature of Force**

Type of force	Number of trials	% of trials where consent was in issue	% of trials where force was in issue
Physical violence	33	75	92
Physical injury	33	75	92
Weapons	16	36	44

Overall, evidence of force was adduced in 82% (36) of those trials (44) where the Crown was required to prove the complainants' absence of consent as an ingredient of the offence(s) charged or to negative consent as a defence available to the accused. The evidence of force relied upon by the Crown consisted of physical violence (33 trials, 92% of trials where there was evidence of force), use of a weapon (16 trials, 44%) and physical injury to the complainant or some other person in her presence (33 trials, 92%).

In the majority of cases, (22, 67%), the physical injuries were of a minor nature, consisting of minor bruising and abrasions. In nine cases the injuries were of medium-level seriousness and involved black eyes, more severe, often multiple lacerations and multiple and extensive bruises. In two cases, where the injuries were serious, they included broken bones as well as extensive bruising and lacerations. In one of these cases, the injury was inflicted upon the complainant's de facto spouse, not the complainant. However, in no case were the injuries treated as amounting to grievous bodily harm within the meaning of s2A(3) of the *Criminal Code*. Accordingly, one comment that can be made at this point is that subsection (3) of s2A played no practical role in the construction of absence of consent in any of the cases examined in this study.

In all trials, the existence of the injury was supported by evidence from sources independent of the complainant such as photographic evidence, evidence from medical practitioners or evidence from witnesses such as police officers.

The evidence of violence adduced by the Crown encompassed a broad range of behaviour including, strangulation, biting, pulling hair, punches to the face, stomach and other parts of the body, whipping, kicks to the face and body, firing a loaded gun towards the complainant, twisting the complainant's arms behind her back, head-butting, urinating and defecating upon the complainant, tying the complainant up, smashing objects and dragging and pushing the complainant against hard objects.

In 18 of the 20 trials where the defence of mistaken belief in consent was left to the jury, the Crown adduced evidence of force. In 17 of these cases the force in question consisted of violent behaviour towards the complainant and in 15, there was evidence that the complainants had sustained physical injury. In six of these trials, there was evidence that the accused had used a weapon.

3.1.2 Threats

Threats comprised the next most common basis after physical force upon which the Crown relied to establish absence of consent. Overall, evidence of threats was adduced in 27 (61%) of the cases where the Crown was required to establish absence of consent. In 17 of these cases consent comprised the defence relied upon by the accused. In all cases where there was evidence of threats, the threats involved threats of physical injury to the complainant and in one case as well, the accused threatened to kill members of the complainant's family. In 16 trials, the evidence of threats consisted of threats with a weapon. In five of these trials there was evidence that the accused had threatened the complainant with a gun and in nine trials, the evidence was that knives were used. The weapons in the remaining cases consisted of miscellaneous objects including a wire coat hanger and, in one case, an unidentified metal object that the accused had simply described to the complainant as a weapon. Overall, in 15 (55%) of the 27 cases where the Crown adduced evidence of threats, the accused were convicted of some or all counts charged. However, in only six (35%) of the 17 cases where the accused asserted that the complainants had consented, were convictions obtained on some or all the sexual offences tried.

In 12 cases where mistaken belief in consent was left to the jury, the Crown tendered evidence of threats, all involving threatened physical harm to the complainant. In only three of these cases were the accused convicted of some or all the sexual offences counts in the indictment.

3.1.3 Fraud

Fraud was relied upon by the Crown to establish that consent had not been freely given in only one trial. In that case the Crown alleged that the complainant had submitted to the accused's masturbation of his, the complainant's penis because he was induced to believe, by the accused's deliberate and deceitful conduct that what was happening was part of a legitimate clinical or diagnostic procedure. At the time, the complainant was an in-patient at a hospital under-going an operation for testicular cancer. The accused was a medical student. The defence asserted that the contact in question involved only a proper and legitimate medical examination with no sexual component to it. The accused was acquitted.

3.1.4 Complainant overborne

The Crown sought to establish absence of consent on the basis that the complainants' will had been overborne by the nature or position of the accused in only four trials. In one of these, the Crown had additionally relied upon fraud to vitiate consent. In two of these trials the Crown relied upon the complainants' young age and the age disparity between the accused and the complainants to establish that they had been overborne. In these two cases the

accused were convicted of some of the sexual offences charged. In the third case, the Crown asserted that the accused had overborne the complainant by virtue of their employer/employee relationship, and also by virtue of the age disparity between them. The complainant was sixteen at the time of the offences and the accused was over forty. In this case the accused was convicted of the majority of the sexual offences charged. In the remaining case, which also involved the issue of fraud, the Crown relied upon the fact that the complainant and the accused were in a doctor-patient relationship to establish that the complainant was overborne by the accused's position. In this case the accused was acquitted on all counts.

3.1.5 Drug or alcohol induced incapacity

Drug or alcohol induced incapacity to consent was relied upon by the Crown to exclude consent in only two cases. One of these cases involved a combination of alcohol and drug induced incapacity, the other involved only alcohol induced incapacity. In both cases the accused asserted that the complainants had consented to sexual intercourse. In one, the accused also relied, in the alternative, upon the defence of mistaken belief in consent. In this latter case the jury convicted the accused on all counts. However, in the other case there was a complete acquittal.

3.1.6 Inability to form a rational opinion

Apart from drug or alcohol induced incapacity to consent, incapacity to form a rational opinion upon the matter to which consent is given within the meaning of s2A(1) was relied upon to negative consent in only one trial examined for the present study. This case involved three male complainants aged between four and 14 years of age at the time that the offences were committed. Their incapacity to form a rational opinion was constructed on the basis of their immature ages at the time that the earliest offences were committed. This case also comprised one of those where the Crown alleged non-consent upon the basis that the complainants had been overborne by the nature and position of the accused. The accused was convicted of some of the counts of sexual offences in the indictment.

3.1.7 Other

In one trial the Crown sought to establish absence of consent on a basis other than one of the circumstances in s2A(2). In this case it was alleged that the complainant had not consented to the accused's masturbation of his penis because he was unaware of or mistaken about the sexual character of the act that was being performed. The Crown case was that the complainant thought that the accused's masturbation of his penis was a legitimate diagnostic process, whereas it was performed for the sexual gratification of the accused. The accused was alleged to have misled the complainant by his behaviour and his demeanour as to the true character of the act. In fact, there appears to be little to distinguish the construction of mistake in this case from fraud, which was the alternative ground relied upon by the Crown (see paragraph 3.1.3 above). In the trial judge's direction to the jury there is also no perceptible differentiation between the concepts of mistake and fraud, (see below at paragraph 4.4).

3.2 Defences to Evidence of Non-Consent

As the earlier analysis shows, evidence that complainants had sustained injuries, that the accused had behaved violently towards them, used a weapon or threatened to inflict physical injury upon them did not deter accused from maintaining that complainants had consented to sexual contact. Nor did it preclude the accused from claiming a mistaken belief in complainants' consent. Tables 8, 9 and 10 set out the overall findings concerning the

different strategies employed by the defence to nullify or explain away the evidence adduced by the Crown of injury, violent behaviour and weapons.

3.2.1 Defences to evidence of physical injury

In a number of cases, the accused put forward more than one explanation for the complainants' injuries. Table 8 shows that in the majority of trials involving evidence of injury the accused simply denied causing it. This finding accords with those of the first Victorian study⁸⁴ where it was also found that denial that the accused caused the injury was the most common defence response to Crown evidence of injury. In three trials where the accused denied causing the injury, it was asserted that the complainants had inflicted the injury deliberately upon themselves to support their allegations of sexual assault. In four cases, the defence claimed that the complainants had accidentally sustained injuries through no fault of the accused when they fell against a hard or sharp surface during the course of consenting sexual activity. In one case that was tried three times, the accused alleged that the complainant had sustained all her physical injuries after consensual sexual contact had occurred, when the car in which she was travelling was involved in an accident. In one other case the accused claimed that the complainant's injuries were caused by her precipitate and apparently irrational exit from the scene of a consensual sexual encounter through a window which she broke to effect her exit. The accused was convicted. In the remaining trials where the accused denied causing the injury, no alternative explanation was offered for their existence.

Table 8 also shows that in a number of cases (11) the accused admitted that the complainants were injured during the course of their sexual encounter, but asserted that this was, nevertheless, consistent with consensual sexual contact having occurred. In five of these cases the injuries sustained were of a minor nature, in five they were of medium-level seriousness and in one the injuries were serious and included a cracked rib.

In one case, the accused admitted causing injury to the complainant, but claimed that it was inflicted accidentally when his elbow struck her in the face. The jury convicted the accused of one count of rape but acquitted him of a second count. In one other case, the accused acknowledged that the complainant had been injured prior to sexual intercourse occurring but, nevertheless, maintained that her consent to sexual intercourse was freely given because his violent conduct had ceased by the time the sexual contact occurred. Medium-level physical injuries had been sustained by the complainant in this case. Not all those injuries were directly inflicted by the accused, although those that were not were at least indirectly attributable to him, having been sustained by the complainant when she attempted to escape from the accused by jumping out of a moving motor vehicle in which he was abducting her. Nevertheless, the jury returned the somewhat discrepant verdicts of guilty on two charges of aggravated assault but hung verdicts on two counts of rape.

⁸⁴

Law Reform Commission of Victoria, (1991) *Report No 42*, supra pp 91–93.

Table 8: Defence to Evidence of Injury

Line of defence	Number of trials	% of trials where evidence of injury was adduced to prove non-consent
Denied causing	17	52
Consistent with consensual sex	11	33
No explanation offered	5	15
Self inflicted by complainant	3	9
Denied existence of injury	2	6
Identification contested	1	3
Accidental	1	3
Occurred before consensual sex	1	3

3.2.2 Defences to evidence of violent behaviour

Table 9 shows that in the majority of cases where there was evidence of violent behaviour on the part of the accused, (26 out of 33), its existence was simply denied by the accused, yet in 20 of these cases, the Crown also adduced evidence of physical injury to the complainant to support the assertion of violence and in 12 cases there was evidence that the accused had used a weapon. In only two cases where there was evidence of violence involving the use of a weapon were the accused acquitted of all charges. In five of the cases where the evidence of violence was supported by evidence of injury, the accused was acquitted of all charges. In all these cases the injury was of a minor nature. However, in six other trials, where there was evidence of both violence and physical injury, the jury returned hung verdicts and in two of these cases the physical injury was of medium-level seriousness.

In four trials, the accused claimed that the evidence of physical violence was either part of or consistent with consensual sexual conduct. In none of these cases were the accused convicted of any of the sexual offences charged. In one case that was tried twice, the accused asserted that the apparent violence was part of consensual sado-masochistic bondage. According to the complainant, the violent behaviour involved the accused strangling her with his hands, striking her in the face and tying her wrists behind her back with a bed sheet which was also pulled over her face and neck, semi-suffocating her. The accused denied all this violence except tying the complainant's hands behind her back and throwing the sheet over her face. In the first trial of this case the jury returned hung verdicts on all counts. In the second trial, the jury acquitted the accused of one count of rape and returned hung verdicts on the remaining three counts.

In the two remaining trials where the accused claimed that the evidence of violence was consistent with consensual sexual contact, there was evidence that the complainants had been threatened with weapons – a gun in one case and a gun and a knife in the other. Both complainants had sustained injuries in the course of the attacks upon them. One accused claimed that these were simply the marks left by love bites and rough love-making. He denied threatening the complainant with a gun, claiming that the only use he had made of the weapon was to threaten to commit suicide. The other accused had abducted the complainant

at gun- and knifepoint after tying up and gagging her pregnant sister. However, he claimed that his violent behaviour had ended by the time that sexual intercourse occurred and that sex occurred in resolution of the conflict and as part of a reconciliation process between himself and the complainant. He pointed to past occasions of conflict that had similarly concluded in consenting sexual activity.

In three trials the accused denied being the perpetrators of the violent behaviour. In one of these cases, the accused claimed that the complainant, not he, had behaved violently, that she had injured both him and herself and also caused damage to property, that she had punched herself in the face and attempted to commit suicide with a knife. He claimed that the complainant was a violent person, that she was psychologically disturbed and receiving treatment from a psychologist. He was convicted of two counts of rape.

Table 9: Defence to Violent Behaviour

Line of defence	Number of trials	% of trials where evidence of violence was adduced to prove non-consent
Denied violent behaviour	26	79
Consistent with consensual sex	4	12
Identification contested	3	9
Complainant violent	1	3
No explanation offered	1	3

3.2.3 Defences to evidence of weapons

The most common response by the accused to Crown evidence that a weapon had been used to threaten the complainant, was denial that this had occurred. However, in six trials the accused admitted that a weapon had been used but maintained that, nevertheless, the complainant had freely consented to sex. These results conform to those of the first Victorian study where it was also found that in most cases where there was evidence of the use of a weapon the accused simply denied this allegation. Similarly, in a small number of cases in the Victorian study, the accused claimed that there was consent even though a weapon had been involved.⁸⁵

In three trials in the present study the accused alleged that weapons had not been used to threaten the complainants, but that instead their unfulfilled intention had been to commit suicide. In one of these trials, the jury convicted the accused of one count of aggravated assault, acquitted him of one count of rape but could not reach a verdict on the four remaining counts of rape. When this matter was retried the jury returned guilty verdicts on all counts. In the third trial, the accused was found not guilty of all sexual offences charged but was convicted of assault by biting the complainant.

A contrasting explanation for the presence of a weapon was offered by an accused in one case, who claimed that he had not wielded the weapon, but that the complainant had attempted to use it to injure herself. The accused in this case was convicted on all counts. In two trials the accused admitted the presence of a weapon, but denied using it in a threatening manner. For example, in one of these trials the accused claimed that although he had had a

⁸⁵ Ibid., pp 93–94.

weapon, a pocket-knife, and although he had been holding it in his hand, it had not been used in a threatening manner. He asserted that he had merely been playing with it when he first confronted the complainant, his ex-fiancee and that he had put it away by the time any sexual contact occurred. He was acquitted of the charge of rape but convicted of aggravated burglary. In one other case, the accused admitted that he had threatened the complainant, but denied that in doing so he had used either a gun or a knife as the Crown alleged. Instead, he said that he had used a stick. He also claimed that the complainant did not subsequently submit to sexual intercourse as a result of threats with the stick but had consented as part of a process of mutual reconciliation. The jury returned hung verdicts on both charges of rape, but convicted the accused of two counts of aggravated assault.

Table 10: Defence to Evidence of Weapons

Line of Defence	No. of trials	% of trials where evidence of weapons was adduced
Denied weapon used	7	44
Suicide threat not threat to complainant	3	19
Identification contested	3	19
Denied use in a threatening manner	2	13
No explanation offered	1	6

3.3 Defence Strategies to Undermine the Credibility of the Complainants' Assertions of Non-consent.

Research has shown that the way that the defence constructs the complainant's behaviour prior to and during the assault can have an impact on the jury's assessment of the case.⁸⁶ In particular, in their influential study of juries, Kalven and Zeisel identified a defence process of 'bootlegging the tort concepts of contributory negligence and assumption of risk' into the law of sexual assault.⁸⁷ They concluded that if the complainant is perceived by the jury to be 'unworthy' or to have in some way provoked or precipitated the sexual attack, then she may be considered not to merit the protection of the law.⁸⁸ In conformity with other recent Australian studies, the present research evaluated the extent to which particular themes were deployed by the defence in the trials examined to undermine the credibility of complainants' assertions of non-consent or to convey the impression that complainants were responsible for the accuseds' conduct. The specific themes explored were:

- whether the complainant behaved in a sexually provocative manner;
- whether the complainant had been drinking or had taken drugs on the day of the offence;
- the style of clothing worn by the complainant;
- the representation of the complainant as responsible for or as contributing to the offence;

⁸⁶ The complainants' behaviour after the attack is also influential in this regard. This feature is the subject of the next report in this series where the issue of recent complaint will be considered.

⁸⁷ H Kalven and H Zeisel, (1966) *The American Jury*, Boston: Little, Brown & Co., pp 242-245.

⁸⁸ Ibid and see also HS Feild and LB Bienen, (1980) *Jurors and Rape*, Toronto: Lexington Books; AP Sealy, and CM Wain, (1980) 'Person perception and jurors' decisions', *British Journal of Social and Clinical Psychology*, vol 19, no 7, p 15; C Jones and E Aronson, (1973) 'Attribution of fault to a rape victim as a function of respectability of the victim', *Journal of Personality and Social Psychology*, vol 26, p 415; Z Adler, (1989) *Rape on Trial*, London: Routledge and Kegan Paul.

- the representation of the complainant as lying or fabricating her account;
- the lack of physical injury to the complainant as a result of the offence;
- inadequate resistance offered by complainants during the assault.

Table 11 sets out the number of trials where the defences of consent and/or mistake were relied on in which these different themes appeared in the cross-examination of complainants. In individual trials, it was the general practice of defence counsel to utilise a number of these themes in an attempt to undermine complainants' credibility.

Table 11 shows that the rate of use of the majority of the cross-examination themes was roughly equal in consent and mistaken-belief-in-consent cases. However, cross-examination about the complainants' style of clothing and/or the complainants' responsibility for or contribution to the offence appeared with increased frequency in cases where the defence of mistaken belief in consent constituted an alternative defence in the case to consent. Predictably, the most commonly occurring cross-examination theme was that the complainant was lying or making up her account. Each cross-examination theme is discussed further below.

Table 11: Themes in Cross-Examination

Theme	Number of trials where consent was relied upon and theme was employed	% of trials where consent was relied upon	Number of trials where mistake was in issue and theme was employed	% of trials where mistake was in issue
Sexually provocative behaviour	15	47	9	45
Drinking or Drug Taking	21	66	14	70
Style of clothing	13	41	10	50
Responsible or contributing behaviour	22	69	16	80
Lying or making up the story	24	75	16	80
Injuries	17	53	12	60
Inadequate resistance	22	69	15	75

3.3.1 Sexually provocative behaviour on the part of the complainant.

In almost half of the trials where consent was raised as a defence, complainants were questioned about having flirted with or behaved in a sexually suggestive fashion in the presence of the accused. This is a slightly lower rate than was found in the New South Wales study of sexual offences trials conducted in 1996. That study found that complainants were cross-examined about sexually provocative behaviour in 58% of trials.⁸⁹ The rate of cross-

⁸⁹ Department for Women, New South Wales, (1996) *supra* p 160.

examination on this topic found by the most recent Victorian study is roughly equivalent to that found in the present study, (45.7%).⁹⁰ This line in cross-examination seeks to leave the jury with the impression that the complainant's behaviour prior to the offences occurring indicated to the accused that she was sexually available and that it can be extrapolated from that that she later consented to sexual intercourse. The following extracts from three trials provide examples of cross-examination on this theme.

Extract Number 1

Defence Counsel: 'Would you agree with me that my client and RD were at that table near the bar?'

Complainant: 'No, I didn't notice. I didn't notice where they were.'

Defence Counsel: 'I suggest that you did because you went up to that table and you were speaking to my client and the male person and RD?'

Complainant: 'No, I can't remember that.'

Defence Counsel: 'And I suggest to you that you put your arm around my client and you said to him, "This is your lucky night."?'

Complainant: 'No, absolutely not.'

Defence Counsel: 'Are you being truthful about that?'

Complainant: 'Absolutely.'

Defence Counsel: 'Miss G.?'

Complainant: 'Yes, I'm being absolutely truthful about that. It's something I wouldn't say to anyone, let alone to someone I'd just met.'

Defence Counsel: 'So the proposition I put to you, you strenuously deny?'

Complainant: 'Absolutely, wholeheartedly.'

Defence Counsel: 'Did you dance with my client at the X Hotel?'

Complainant: 'No, I didn't.'

Defence Counsel: 'What would you say to the proposition that you did dance with my client?'

Complainant: 'It's incorrect. I didn't. I was dancing by myself by the jukebox, momentarily.'

Defence Counsel: 'Right. I have asked you did you dance with my client?'

Complainant: 'No, I didn't.'

Defence Counsel: 'What would you say to the proposition that you danced with my client and each of you had your hands on each other's hips?'

Complainant: 'No, that's just not the case. I mean, my boyfriend was there and no, it's not the case. No, I never touched the man'.⁹¹

Extract Number 2

Defence counsel: 'he says something to you about having a relationship doesn't he?'

Complainant: 'Yep.'

Defence counsel: 'He wants a relationship doesn't he?'

Complainant: 'Yep.'

Defence counsel: 'With you?'

Complainant: 'Yep.'

⁹⁰

M Heenan and H McKelvie, (1997) *supra* pp 193-194.

⁹¹

Case number 15.

Defence counsel: 'And he says, "Well we could just be friends and see how it goes from there." That is correct isn't it?'

Complainant: 'Mmmm.'

Defence counsel: 'To which you responded, "No I just want to tart and slut around a bit."?'

Complainant: 'Yeah.'

Defence counsel: 'And that wasn't....you said both those words didn't you?'

Complainant: 'Yes.'

Defence counsel: 'You used them both and said that if he said to you "If you just want a bit of dick, I can give you that"? (Sic)

Complainant: 'Mmmm.'

Defence counsel: 'In that conversation, did you, in fact say, "I only want to tart or slut around a bit. I'm only out for a bit of dick."?'

Complainant: 'No, I didn't.'

Defence counsel: 'To which he then responded, "I could give you that"?'

Complainant: 'No'.⁹²

Extract Number 3

Defence counsel: '...Now would you agree that before the two of you left S Street you had kissed, sorry – he had kissed you?'

Complainant: 'No.'

...

Defence counsel: '...Well, when he did kiss you in the school yard did you kiss him back?'

Complainant: 'I might of. It was that quick and it was such a shock – when someone kissed you.'

Defence counsel: 'It was such a shock that you might have kissed back and I mean it wasn't something that you were repelled by was it?'

Complainant: 'No.'

Defence counsel: 'No. It was something you wanted wasn't it?'

Complainant: 'No. I think he was rough.'

Defence counsel: 'Because he was rough. Well, can I ask you this, so far we have got you meeting somebody, walking up the street, ultimately holding hands with him at some point of the journey, and somebody you were at least interested in, right, is that right?'

Complainant: 'Yes.'

Defence counsel: 'Then you invited him, or either him and his friend to your unit for a cup of coffee?'

Complainant: 'Yes.'

Defence counsel: 'Well, if you wanted to go for a cup of coffee, couldn't you just walk back down to the Pizza Parlour and sit in there? They have coffee in there don't they?'

Complainant: 'I don't know'.⁹³

⁹² Case number 13.

⁹³ Case number 8.

3.3.2 Drinking or taking other drugs

Over 60% of complainants in trials where the accused asserted that sexual contact was consensual and 70% of complainants in cases where the accused relied upon the defence of mistaken belief in consent, were cross-examined about their alcohol consumption or drug taking either in general, or on the day of the offence. This rate is similar to that uncovered by the New South Wales study (60%)⁹⁴ but higher than that found in the most recent Victorian study (51.3%).⁹⁵

Usually, the questions about their alcohol consumption on the day of the offence required complainants to recount in some detail and with some precision how much and what type of alcohol they had consumed, between what times it was consumed and what effect it had upon them. In particular they were questioned about its effect upon their ability to make a decision whether or not to engage in sexual intercourse and about its effect upon their ability to recall events. The focus on the former matter aimed to ensure that the jury would not form the impression that the complainant may have been incapable of making a rational decision concerning consent. The focus on the latter matter sought to raise doubts in the jury members' minds concerning the reliability of the complainant's account of non-consent or of her memory of the events. It served the additional purpose of implying that the complainant may have consumed just enough to reduce her inhibitions in relation to consensual sexual conduct but not so much that her ability to reason in relation to this matter could be said to be impaired. The following extract is a typical example of cross-examination about complainants' alcohol consumption:

Defence counsel: 'You were not so affected by alcohol that you were unable to take a proper decision as to whether you wanted to take part in an act of intercourse or not?'

Complainant: 'Yes. That's right.'

Defence counsel: 'Whatever the effect of alcohol, it wasn't such a severe effect that you couldn't make that kind of decision?'

Complainant: 'Yes, that's right.'

Defence counsel: 'Now, just if I can perhaps turn from the question of the effect it had on your mind, the amount of alcohol you had consumed, to the effect it might have had on your recollection of detail. You'd accept, would you, that consumption of alcohol on occasions causes some people to have a less effective memory or recall than they normally have?'

Complainant: 'It could, yes.'

Defence counsel: 'Okay. Are you a person who, if you consume alcohol sometimes has a less than perfect memory afterwards?'

Complainant: 'No.'

Defence counsel: '...I'm sorry, regardless of your consumption of alcohol, your memory's the same is it? No matter how much alcohol you drink?'

Complainant: No audible reply.

Defence counsel: 'No matter how much alcohol you drink? Is that still the situation?'

Complainant: 'I don't know.'

Defence counsel: 'You don't know. Well, I'm just trying again to allow the jury to make some assessment of the extent of your recall. Prior to this incident on New Year's Day 1993 were you a person who consumed alcohol very regularly?'

Complainant: 'Yes, I did.'

⁹⁴ Department for Women, New South Wales, (1996) *supra* pp 161-162.
⁹⁵ M Heenan and H McKelvie, (1997) *supra* p 193.

Defence counsel: 'And consumed it in large quantities or not?'

Complainant: 'No, moderately.'

Defence counsel: 'Okay. Only ever moderately?'

Complainant: 'Yes.'

Defence counsel: 'And just so they can judge that, what was your moderate consumption on average if you went out say for, to a party or something like that at that time in your life?'

Complainant: 'Between how many hours?'

Defence counsel: 'Well, if you went out for the night to a party?'

Complainant: 'I would probably drink one can in an hour.'

Defence counsel: 'Well this, we know that this party went on over a variety of places, but went on for in excess of twenty-four hours?'

Complainant: 'Yes.'

Defence counsel: 'So what would you say would be your best estimate of the amount and type of alcohol you'd consumed over that period?'

Complainant: 'I can't say exactly how much I drank, but I wasn't drinking constantly. I had hours of break in between.'

Defence counsel: 'Well you go out on New Year's Eve. I mean that's a time of the year when people go out for the purpose of celebration, is that right?'

Complainant: 'Yes.'

Defence counsel: 'And I take it when you went to the hotel on New Year's Eve your purpose in going there was to celebrate?'

Complainant: 'Yes.'

Defence counsel: 'That night, drink more than your average amount of alcohol – initially at least?'

Complainant: 'Yes.'

Defence counsel: 'Right, so I can't, I'm not exactly expecting you to remember exactly down to the last six ounce glass, but assist the jury, - in the time that you were at the R Hotel, roughly how much alcohol do you reckon you had to consume?'

Complainant: 'Probably, half-a-dozen pots.'

Defence counsel: 'Again, to assist, does that mean a ten ounce beer?'

Complainant: '-The, - I don't know what they call them in Tasmania – ten ounce, yes.'

Defence counsel: 'To the best of your recall, at the hotel you would have had about a dozen ten ounce beers?'

Complainant: 'Yes.'

Defence counsel: 'Now you went away from the R Hotel to another party didn't you?'

Complainant: 'Yes.'

Defence counsel: 'Did you have any alcohol to drink then?'

Complainant: 'No, I didn't'.⁹⁶

3.3.3 Style of clothing

The rate at which complainants were questioned about their clothing (41% of consent trials and 50% of mistaken-belief-in-consent trials) is comparable to that found by the New South Wales study (44%)⁹⁷ but greatly in excess of the rate found in the most recent Victorian study (16%).⁹⁸ The New South Wales and Victorian research found that cross-examination about the complainants' style of clothing was most commonly directed at raising the inference that their dress was sexually suggestive. This particular theme was infrequently encountered in the present study. It did, however, emerge in a small number of cases where the complainant had prepared for bed when the attack occurred and was wearing nightclothes. In these cases, the innuendo of the cross-examination was that because the complainant was wearing her nightclothes in the presence of the accused, she was wittingly behaving in a sexually permissive or provocative fashion. An example of this is provided by the first extract given below. More commonly, it was found in the present study that cross-examination about complainants' clothing aimed to show that the clothing was protective and could not have been removed unless it had been removed consensually. In this way the complainant's clothing is used to provide evidence of consent, the suggestion being that unless she had removed that clothing willingly or it had been removed by the accused with her cooperation, it could not have been removed at all. It was too tight, too strong or in some way too firmly attached to the complainant to have been removed by the accused without her concurrence. Extract Number 2 below illustrates this approach.

In the case from which Extract Number 1 is taken defence counsel questioned the complainant about her dress on the night of the offence and about her dress on previous evenings when the accused had visited her. On none of these occasions was the accused an invited guest.

Extract Number 1

Defence counsel: 'And over the period of two years he visited you there frequently?'

Complainant: 'Yes he did.'

Defence counsel: 'And is it true that he generally came around nine o'clock or later?'

Complainant: 'Around that, yes.'

Defence counsel: 'And the majority of the time, after midnight?'

Complainant: 'Yeah, after midnight.'

Defence counsel: 'And, very often you would be in bed when he arrived, wouldn't you?'

Complainant: 'Yes, I would.'

Defence counsel: 'And you'd be wearing a nightie?'

Complainant: 'Yes, I would.'

Defence counsel: 'And it was quite frequent for him to knock on the window wasn't it?'

Complainant: 'Yes, it was.'

Defence counsel: 'And you'd go to the door?'

Complainant: 'Yes, I would.'

Defence counsel: 'Answer the door in your night dress and let him in?'

Complainant: 'Yes, I would.'

⁹⁷ Department for Women, New South Wales, (1996) *supra* pp 162-163.
⁹⁸ M Heenan and H McKelvie, (1997) *supra* pp. 193-194.

...

Defence counsel: 'And you'd generally answer the door in your night dress?'

Complainant: 'Yes.'

...

Defence counsel: 'I put it to you that on the night in question he knocked on the window once or twice?'

Complainant: 'He banged on the window.'

Defence counsel: 'How many times?'

Complainant: 'I'm not sure.'

...

Defence counsel: 'Now when you answered the door eventually in your night dress, were you wearing pants underneath the night dress?'

Complainant: 'No.'

Defence counsel: 'You weren't?'

Complainant: 'I only had my night dress on'.⁹⁹

Extract Number 2

Defence counsel: 'You said you were wearing jeans?'

Complainant: 'Right.'

Defence counsel: 'Is that right?'

Complainant: 'Yes.'

Defence counsel: 'Now you recall giving evidence in another courtroom about this same incident in a preliminary kind of hearing before the trial, is that right?'

Complainant: 'Mmm.'

Defence counsel: 'And you will recall what it was you said at that time?'

Complainant: 'Yes.'

Defence counsel: 'You will recall you were asked at that time whether the jeans were loose-fitting or tight?'

Complainant: 'Yes.'

Defence counsel: 'And you said that, you agreed that someone would struggle to get in or out of them?'

Complainant: 'Mmm.'

Defence counsel: 'And that was obviously true?'

Complainant: 'Yes.'

Defence counsel: 'So the jeans you had on were tight and tight to the extent that it would be a struggle to get them on or off?'

Complainant: 'Mmm.'

Defence counsel: 'Okay, now you've described at the outset of the questions I asked you that the jeans you were wearing that night as being very tight?'

Complainant: 'Yes.'

Defence counsel: 'And difficult to get in and out of?'

Complainant: 'Yes.'

Defence counsel: 'I take it that you were resisting him taking your jeans off, were you?'

Complainant: 'Yes.'

Defence counsel: 'Well, here's someone who's getting off jeans, did he take them off?'

Complainant: 'Yes.'

Defence counsel: 'They're tight, very difficult for you to get in and out of, you're resisting. But he still managed to get them off, without any cooperation from you. Is that your evidence?'

Complainant: 'Yes.'

Defence counsel: 'Okay. You see what I want to suggest is that you removed your own jeans?'

Complainant: 'No I didn't'.¹⁰⁰

3.3.4 The complainants' contribution to or responsibility for the offence

This cross-examination theme featured in almost 70% of the trials where consent was relied upon by the accused and in 80% of cases where the defence of mistaken belief in consent was left to the jury. This is a significantly higher proportion of cases than was found in the New South Wales study, which found that only 32% of complainants were questioned upon this theme.¹⁰¹ This matter has not been investigated in Victoria. The cross-examination on this theme usually aimed to show that the complainant's behaviour precipitated the course of events that followed or was indicative in some way that she was sexually available to the accused. In mistaken-belief-in-consent cases, the complainants' allegedly precipitating conduct provided a foundation on which to construct the accused's mistaken belief. The clear implication of this cross-examination theme is that the complainant has voluntarily assumed the risk of sexual contact with the accused or, alternatively, that she has been guilty of contributory negligence. The concomitant inference then is that the accused's conduct should not be viewed as criminal. The following extracts from two cases illustrate these points. In the case from which the first extract is taken, the complainant had met the accused by accident when she was walking home alone at night after an evening spent socialising with friends. This was the first time that she had met the accused.

Extract Number 1

Defence counsel: 'Now as far as you could see your meeting was purely coincidental in that he has walked out and he is crossing the street, the two of you happen to come to the same place at the same time is that right?'

Complainant: 'Yes.'

Defence counsel: 'And you continued walking up the hill the two of you, talked?'(sic)

Complainant: 'Yes.'

Defence counsel: 'And the talk was quite friendly in nature?'

Complainant: 'Yes'.

Defence counsel: 'You exchanged names?'

Complainant: 'Yes, I think so.'

Defence counsel: 'And you actually held hands as you walked up the hill didn't you?'

Complainant: 'I don't remember that.'

....

¹⁰⁰

Case number 8.

¹⁰¹

Department for Women, New South Wales, (1996) supra pp 165-166.

Defence counsel: 'Okay, well by the time you got to the top of the hill he's holding your hand?'

Complainant: 'No, we sat down first.'

Defence counsel: 'Yep, and then he held your hand?'

Complainant: 'Yes.'

Defence counsel: 'Now you, you used the expression, "grabbed me hand." You're not suggesting he grabbed it in a forceful way are you?'

Complainant: 'No.'

Defence counsel: 'Well, what you really mean is, he took your hand?'

Complainant: 'Yes.'

Defence counsel: 'And you didn't pull it away, pull yours away?'

Complainant: 'No.'

Defence counsel: 'You didn't do anything to indicate that you didn't want him to hold your hand?'

Complainant: 'No.'

Defence counsel: 'You didn't find what he'd done offensive at all?'

Complainant: 'No.'

Defence counsel: 'I mean, the fact is that a few minutes earlier he was a total stranger. You've had a chat and exchanged names, and you were not at all offended by him holding your hand as you continued your walk?'

Complainant: 'Yes.'

Defence counsel: 'That's right?'

Complainant: 'Yes.'

Defence counsel: "And in fact, as you were walking along with him holding your hand, you made some comment to him about "here his girl friend was", whether he had a girl friend, or something like that?'

Complainant: 'Yes.'

Defence counsel: 'And he told you, "No," he didn't have one?'

Complainant: 'Yes.'

Defence counsel: 'Now obviously you were not enquiring about his girl friend just because you had nothing else to say. I mean, you were enquiring about his girl friend, because you were interested in whether he was available, isn't that true?'

Complainant: 'Well, not to me, sort of, I was just saying, oh, I don't know.'

Defence counsel: 'Here's a bloke you haven't met before. As you wander along the street, he takes, he doesn't grab your hand as you suggested to the jury, takes hold of your hand in quite a normal way, is that right?'

Complainant: 'Yes.'

Defence counsel: "You did absolutely nothing to say, "Well, let me go. I don't even know you". You continue to hold onto his hand. He holds onto yours and you walk along. That's the situation isn't it?'

Complainant: 'Yes.'

Defence counsel: 'And then you ask him, "Does he have a girlfriend", or words to that effect?'

Complainant: I probably did think, he was okay but it doesn't mean I'm going to have sex with him.'

Defence counsel: 'I'm not suggesting it is. I am just asking you whether you accept that by asking him whether he had a girl friend you were trying to ascertain whether he was available, is that true or not?'

Complainant: 'Yes.'

Defence counsel: 'Yes, thank you. So when you said before you weren't trying to find out whether he was available to you, that was not correct was it?'

Complainant: 'No.'

Defence counsel: 'Thank you. So you would accept that the evidence that you gave to the jury on that point was wrong?'

Complainant: 'Yes.'

Defence counsel: 'And deliberately wrong?'

Complainant: 'Yes.'

Defence counsel: 'Because you didn't want the jury to think that you might have been interested in this young man, is that right?'

Complainant: 'Yes'.¹⁰²

In the trial from which the second extract is taken, the Crown case was that the complainant had been abducted by three men and raped. She had encountered them earlier in the evening while drinking with friends at a hotel. On the point of leaving the hotel she had invited another young man who was present to a party that was then under-way at another location. The invitation was overheard by the accused, who followed her, her girl friend and the other young man, with the intention of attending the same party.

Extract Number 2

Defence counsel: 'There's no doubt at all is there that you asked Mr. L to go to this party up in M Street?'

Complainant: 'No.'

Defence counsel: 'Would you agree that in the circumstances, well, perhaps I should ask you this first – you asked him to go?'

Complainant: 'Yes.'

Defence counsel: 'In fact your invitation was extended to the group as a whole?'

Complainant: 'I was only talking to him, so it was only him.'

Defence counsel: 'Well, the whole group was there, were they not?'

Complainant: 'Up at P Avenue?'

Defence counsel: 'No. The group, the whole group of men that ultimately went in the Nissan vehicle were in the C Hotel when you extended the invitation?'

Complainant: 'No, cause I was only talking to G.'

Defence counsel: 'So, what, the others weren't there with you?'

Complainant: 'I don't recall them being around him, no.'

Defence counsel: 'You don't recall them being there with him at all?'

Complainant: 'Oh, they were there, but not around him when I was talking to him.'

Defence counsel: 'And you don't recall your invitation being extended to the group as a whole?'

Complainant: 'No.'

Defence counsel: 'Okay. Well the reason that you ultimately end up in the Nissan vehicle going out along T M Lane and up to the paddock stop is, because that's the end point.(sic) But the starting point is your invitation to Mr. L to go to a party, is it not?'

Complainant: 'Yes.'

Defence counsel: 'Because it's the invitation to L which gets your group and the group of men walking up the street together?'

Complainant: 'Yes.'

Defence counsel: 'It's the invitation to L which ends up with the Nissan following the taxi up M Street?'

Complainant: 'Yes.'

Defence counsel: 'It's the invitation to L which ends up with you getting into the Nissan to show the men where the party was?'

Complainant: 'Yes.'

Defence counsel: 'So, you'd accept that the invitation to L to go to the party is really the origin of you ending up in that Nissan vehicle?'

Complainant: 'Yes.'

Defence counsel: 'To the starting point of the whole incident is it not?'

Complainant: 'Yes.'

Defence counsel: 'You'd accept that, as the starting point of the whole incident, it's fairly important in the sequence of events?'

Complainant: 'Yes.'

Defence counsel: 'Cause it explains why you ended up in their car?'

Complainant: 'Yes.'

Defence counsel: 'Well, you would accept that in the first – in the description that you gave to the police back on the 25th of December, the very day of the incident, you did not mention to the police that you were the person that had asked L to go to this party?'

Complainant: 'I don't recall whether I did or not.'

[The complainant was then shown her police statement and agreed that she had not told the police that she had invited L to the party.]

Defence counsel: 'You have agreed that that you did not tell the police on the 25th December that you had invited L to a party in M Street?'

Complainant: 'Yes.'

Defence counsel: 'You have agreed that you accept that that is an important piece of information?'

Complainant: 'Yes.'

Defence counsel: 'I want to suggest to you that the reason – I'm sorry, I want to suggest to you that it was a deliberate omission that you chose not to tell the police that piece of information on the 25th of December?'

Complainant: 'No, I didn't.'

Defence counsel: 'And I want to suggest that you didn't tell them that because you didn't want to put yourself in a bad light. You didn't want to be seen as a person who had initiated the invitation to the party?'

Complainant: 'No'.

Later in the same cross-examination the following questions were asked:

Defence counsel: 'You were not dragged into the car?'

Complainant: 'No.'

Defence counsel: 'Got in quite voluntarily?'

Complainant: 'Yes.'

Defence counsel: 'And if you'd ever heard somebody suggest that you had been dragged into the car, you'd obviously say, "No that's not right. I wasn't dragged into that car at all"?'

Complainant: 'Yes.'

Defence counsel: 'You knew the men in the car, or at least some of them had been drinking?'

Complainant: 'Yes.'

Defence counsel: 'You knew at least one of them had been fighting?'

Complainant: 'Yes.'

Defence counsel: 'Yet you got in the car and the vehicle headed off down to the M? Is that right?'

Complainant: 'Yes'.¹⁰³

3.3.5 Lying or fabricating the account

A clear majority of complainants were cross-examined about whether they were lying or fabricating their account. This occurred in 75% of trials where the accused asserted that the complainant had consented to sexual intercourse and in 80% of trials where the accused also relied upon the defence of mistaken belief in consent. These rates are consistent with those found in the New South Wales research (84%)¹⁰⁴ but somewhat higher than those revealed by the latest Victorian study (just over 60%).¹⁰⁵ In the trials in the present study, defence counsel often laid the foundation for the assertion that the complainant was lying by undertaking a painstaking scrutiny of her memory of the event. In employing this tactic, counsel paid particular attention to minute details of the event. The assertion was that the highly traumatic nature of coerced sexual contact would burn all its details onto the victim's memory. A complainant's failure to remember or her confused memory of those details was then represented as exposing her mendacity. The following extract from one trial provides a typical example. In this case, the complainant's account was that the accused pulled her down an alleyway and forced her onto the ground between two cars where he sexually assaulted her.

Extract Number 1

Defence counsel: 'So you turned towards the fence did you?'

Complainant: 'No, I turned towards the alleyway, the lane way, up the lane way.'

Defence counsel: 'That would have your starting point, as having your back towards the alley way?'

Complainant: 'Yes.'

¹⁰³

Case number 7.

¹⁰⁴

Department for Women, New South Wales, (1996) *supra* p 169.

¹⁰⁵

M Heenan and H McKelvie, (1997) *supra* pp 194.

Defence counsel: 'But the way you've described it Miss C, is that you're being pushed backwards between a red and a white car?'

Complainant: 'Yes.'

Defence counsel: 'Your back's got to be facing the fence does it not?'

Complainant: 'Not if you'd turned around, not if he ends up with his arm back against the fence.'

Defence counsel: 'Well how did he get over there? Did you push him over there or something?'

Complainant: 'No.'

Defence counsel: 'You see Miss C, that's what happens isn't it, when you're not telling the truth. And you're not telling the truth are you Miss C?'

Complainant: 'Yes I am'.

Earlier in the same case the following exchange occurred:

Defence counsel: 'I take it you told the police that he was pulling you by both arms did you?'

Complainant: 'Yes. And sort of like round my waist.'

Defence counsel: 'If I suggested to you that what you said to the police was, "He was pulling my left arm"? Is that what you said?'

Complainant: 'Yes.'

Defence counsel: 'Well, that's different to what you've just described to the jury today isn't it?'

Complainant: 'I said he was pulling my wrists and sort of round my waist.'

Defence counsel: 'You told the jury today, I asked you not two minutes ago, how he was doing it. He gripped you on both arms and was pulling both arms, him moving backwards, you moving forwards. That's what you've just described to the members of this jury.'

Complainant: 'Yes, but I did say before that he was also, that he had me round my waist as well.'

Defence counsel: 'Did you tell the police that he was pulling you by your left arm?'

Complainant: 'Yes.'

Defence counsel: 'Is that different to what you've just told the jury?'

Complainant: 'Yes.'

Defence counsel: 'So, I take it that what you've just told the jury is incorrect or what you told the police is incorrect is it?'

Complainant: 'He was pulling my wrists.'

Defence counsel: 'Wrist or wrists?'

Complainant: 'And around my waist.'

Defence counsel: "You told the police that he was pulling you by the left arm. "He also held onto me by putting his arm around my waist and shoulders". You told the jury two minutes ago that he had both your wrists and was pulling your wrists. Do you accept that there's a difference between what you told the police and what you told the jury?'

Complainant: 'Yes.'

Defence counsel: 'What I want to suggest to you is, the difference is, that the reason for the difference is that that just didn't happen. You weren't pulled down there at all and you haven't been able to remember what you said the first time. That's the truth of it isn't it?'

Complainant: 'No'.¹⁰⁶

Generally, the accused asserted that the complainant had a motive for lying and indicated in cross-examination what that motive might be. However, in five (22%) of the trials where the accused alleged that the complainant was lying, no motive was suggested. The most common motive attributed to complainants for lying was that they were embarrassed or felt guilty about their conduct and wished to hide its true nature from their parents, friends, or partners. This motive was ascribed to complainants in nine cases (39%). Other motives appearing in individual cases included, the desire to obtain criminal injuries compensation, to have revenge upon the accused for refusing the complainant's sexual advances or for failing to supply drugs, to prevent the accused from having access to his and the complainant's children and to make a boy friend or partner feel guilty about allegedly neglectful or unfaithful behaviour.

3.3.6 Lack of injury

In 17 (53%) of the trials where the accused alleged consent, complainants were questioned about the fact that they had sustained no injuries or relatively few injuries in the assault. In some cases, this cross-examination reflected the notion that genuinely non-consensual sex necessarily occasions genital or other physical injury. In other cases, the cross-examination was directed at discrediting the complainants' assertions that the accused had used the degree of force alleged. The following cross-examination extracts illustrate these points.

Extract Number 1

Defence counsel: 'Right. So you are suggesting he forced his penis into your vagina?'

Complainant: 'Yes.'

Defence counsel: 'Right. And you said in your evidence you felt no vaginal pain after this occurred. Is that correct?'

Complainant: 'That is correct.'

Defence counsel: 'Did you suffer any bruising on your thighs as a result of this?'

Complainant: 'No'.

In his closing address to the jury, defence counsel in this case said this about the medical evidence of injury to the complainant's body:

'First of all let's look at the medical evidence from Dr.M. My submission to you is, at best that it's non-conclusive. There was nothing about the physical evidence which positively ruled in rape. Whilst rape wasn't eliminated, there was nothing that positively ruled it in. So, in my submission to you, it is not greatly helpful to your deliberations'.¹⁰⁷

Extract Number 2

Defence counsel: 'And when he – he pushed you in that bedroom did he? And when he pushed you into that bedroom, you told us here today, you fell face down onto one of the bunks. That would be the bottom bunk would it?'

Complainant: 'Yes.'

Defence counsel: 'And he pushed you face down at the end?'

Complainant: 'Mmmm.'

Defence counsel: 'And then he, what, turned you over at some stage did he?'

Complainant: 'Somehow, yes.'

¹⁰⁶

Case number 9.

¹⁰⁷

Case number 31.

Defence counsel: 'Now the beds were made out of what, timber or pipe or?'

Complainant: 'Well, I thought they were pipe, but you told me in the committal that they were timber.'

Defence counsel: 'But you've had time to think about it since then?'

Complainant: 'No, I haven't thought about it. I tried to put it -.'

Defence counsel: 'What's your best recollection now? Was it pipe or timber?'

Complainant: 'Well, I thought they were pipe, but you say they are timber, so you can have them timber. It doesn't really matter.'

Defence counsel: 'And the pipe is the framework of the bed?'

Complainant: 'Yes.'

Defence counsel: 'Or the timber would be the framework of the bed, is that so?'

Complainant: 'Yes.'

Defence counsel: 'And the bottom one had something like a bed head didn't it?'

Complainant: 'Yes.'

Defence counsel: 'And the bottom of the bed would have had an end?'

Complainant: 'Yes.'

Defence counsel: 'Now he pushed you forward so your face fell onto the bed and over the end of the bed. The rest of your body was over the end of the bed wasn't it?'

Complainant: 'Yes.'

Defence counsel: 'And then in that position, he turned you over?'

Complainant: 'Yep.'

Defence counsel: 'And is it from that position he then took your trousers off?'

Complainant: 'No, I think he slipped me up the bed a bit.'

Defence counsel: 'I beg yours?'

Complainant: 'Slipped me up the bed a bit.'

Defence counsel: 'He slid you up the bed a bit?'

Complainant: 'Yes.'

....

Defence counsel: 'And that's when he started pulling trousers off and boots?'

Complainant: 'I wouldn't have had boots on. I was inside.'

Defence counsel: 'So he merely pulled your trousers and underpants off?'

Complainant: 'Yep.'

Defence counsel: 'Both legs.'

Complainant: 'I can't remember.'

Defence counsel: 'You can't remember. Apart from the indignity of what happened on that occasion, was there any part of your body that felt some injury? Apart from him penetrating you?'

Complainant: 'He did hurt.'

Defence counsel: 'Beg yours?'

Complainant: 'He hurt the back of my neck.'

Defence counsel: 'He hurt the back of your neck?'

Complainant: 'Yes.'

Defence counsel: 'When did he do that?'

Complainant: 'When he was pushing me in there.'

Defence counsel: 'When he was pushing you into the bedroom?'

Complainant: 'Yes.'

Defence counsel: 'So the only part of your body apart from your vaginal area that was hurt on that occasion was the back of your neck?'

Complainant: 'Well, he had hold of my arm and the back of my neck.'

Defence counsel: 'And he had hold of your arm. Did it hurt immediately afterwards?'

Complainant: 'I don't know. That was the furthestest thing from my mind?'

Defence counsel: 'Well you can't recall?'

Complainant: 'No, I wouldn't have worried about my arm after what he'd just done to me.'

Defence counsel: 'Right, but there was no other part of your body hurting?'

Complainant: 'I don't know.'

[Photographs of the timber bunk beds were then tendered and taken in]

Defence counsel: 'Because I am going to suggest to you that if you were thrust over the end of any bunk bed, whether it is timber or pipe, your back would be injured. Whatever part of your body hit the end of the bed first would be injured, I suggest? Isn't that so? And yet you haven't told us about suffering any injuries to your back or your stomach area or the front of you generally as a result of being thrown over the end of the bed?'

Complainant: 'I don't think I landed on my back or my stomach.'

Defence counsel: 'You've told us your stomach, haven't you?'

Complainant: 'No, I sort of landed on my legs.'

Defence counsel: 'You certainly haven't told us about any injuries to your legs, have you?'

Complainant: 'I didn't think I had any'.

In his closing address to the jury, defence counsel said of the evidence elicited in this exchange:

'...she gives a description that she is pushed into there and then she is thrown over the end of the bed, I suggest. But the end of the bed, when you see the photo, has a normal bed end. It is timber. She thought all along it was pipe. It doesn't matter. And she says she was thrust face down at first then rolled over with her feet in the air. Now members of the jury just think of it. She says she has no problems physically apart from something up near her neck - that was all. So she doesn't suffer any injury to her back or her front while she is over the end of this bed. It couldn't happen, members of the jury. It couldn't have happened at all. So you dismiss that one, I suggest, from your consideration'.¹⁰⁸

Extract Number 3

Defence counsel: 'You've agreed that you've been repeatedly punched to the face?'

Complainant: 'And the head.'

Defence counsel: 'And the head and the stomach?'

Complainant: 'Yes.'

Defence counsel: 'You've been kicked twice in the head with sufficient force to render you unconscious?'

Complainant: 'Yes.'

Defence counsel: 'You've had your hair pulled?'

Complainant: 'Yes.'

Defence counsel: 'Your breasts grabbed so that they hurt?'

Complainant: 'Yes.'

Defence counsel: 'Your legs gripped with sufficient force to try and pull you out of the car?'

Complainant: 'Yes.'

Defence counsel: 'And the only injuries that can be seen that could relate to that, is the mark beside your eye and two bruises on your leg and a bruise on your hip. That's it, isn't it?'

Complainant: 'Yes.'

Defence counsel: 'No other grip marks on your legs, for example?'

Complainant: 'No'

Defence counsel: 'Where someone grabbed the bottom half of your legs and pulled out?'

Complainant: 'No.'

Defence counsel: 'No finger marks from grips and bruising, nothing like that?'

Complainant: 'No.'

Defence counsel: 'No cuts to your face where a man of Mr H's size repeatedly punched in the face with a great deal of force?'

Complainant: 'No.'

Defence counsel: 'Nothing at all?'

Complainant: 'I had a black eye'.¹⁰⁹

3.3.7 Inadequate communication of refusal and inadequate resistance offered by complainants during the assault

In all cases where the accused asserted that the complainants had consented to sexual contact, the complainants were questioned about how they had attempted to communicate their lack of consent to the accused. In all but three of these cases, (29), complainants testified that their refusal of consent was communicated verbally, by for example, saying 'no' to the accused or by telling the accused to leave them alone or by screaming or swearing at the accused. In 22 of these cases, the verbal refusal of consent was accompanied by physical resistance such as struggling, pushing the accused away or punching the accused. In one case where the Crown alleged that the complainant was incapable by reason of intoxication of freely consenting, evidence of non-consent was also supplied by admissions made by the accused to the police that the complainant had pushed him away and that she had said that she only had sexual intercourse with people she loved. The accused was a stranger to the complainant. In one other case where there was no evidence of the complainant's explicit refusal of consent, the Crown alleged that she was too stupefied by alcohol to know what was happening, that she was comatose at the time that sexual intercourse occurred. In the remaining case where there was no evidence of the complainant having verbally communicated her refusal of consent, there was evidence that she physically resisted by moving away from the accused and by kicking him away.

¹⁰⁹

Case number 7.

In 69% of trials, complainants were cross-examined about their alleged failure to resist or about the low level of their resistance. In 75% of cases where mistaken belief in consent was left to the jury, complainants were cross-examined about these matters. Typical examples of the type of cross-examination that occurred on this theme are contained in the extracts from three cases given below.

In the case from which the first Extract is taken, the accused had abducted the complainant, his ex-defacto partner, at gun- and knifepoint from the house where she was staying with her sister. He had broken into the house and severed communication with the outside world by cutting the telephone lines to the house. He threatened the complainant with the gun, tied up her nine-months'-pregnant sister and then drove the complainant to a barn where the sexual offences occurred. The accused was charged with two counts of rape, one count of aggravated burglary and two counts of aggravated assault. In respect of the rape charges he relied upon the defences of consent and mistaken belief in consent. The jury was unable to reach a verdict on those charges, although they did convict the accused on both counts of aggravated assault.

Extract Number 1

Defence counsel: 'Didn't react at all?'

Complainant: 'That's right.'

Defence counsel: 'Well you didn't say "no"?'

Complainant: 'That's right.'

Defence counsel: 'And you didn't scratch him?'

Complainant: 'No.'

Defence counsel: 'Bite him?'

Complainant: 'No.'

Defence counsel: 'Kick him?'

Complainant: 'No.'

Defence counsel: 'Or ask him to stop?'

Complainant: 'That's right.'

Defence counsel: 'So, there in the darkness on that – on those – it was on those bales of hay, wasn't it? I've got that right?'

Complainant: 'Yes.'

Defence counsel: 'On those bales of hay, you just allowed it to happen?'

Complainant: 'Yes, I just laid there, yeah.'

Defence counsel: "But you did nothing to indicate to him that you were not consenting? You did not say, "I don't want to do this. I would prefer not to. Can we go home first?" Anything to indicate to him that you were not consenting?"

Complainant: 'No, I wasn't game to, no'.¹¹⁰

The case from which the second Extract is taken involved three accused. They had abducted the complainant in a car, threatening her with a knife and taking her to an empty field where they kicked and bashed her. The driver of the car in which the complainant was abducted, did not participate in the attack upon the complainant. He testified against the accused,

¹¹⁰

Case number 51.

describing their abusive behaviour towards the complainant in the car and her attempts to resist them and to escape. He fled from the scene before the sexual assaults occurred.

Extract Number 2

Defence counsel: 'Well, could you tell us, while Mr H [first accused] was having sex with you, what did you do to indicate that you were not consenting?'

Complainant: 'I was trying to push him off. I was saying, "No, I didn't want him to do it."'

Defence counsel: 'Okay. Well I take it that you scratched his face did you?'

Complainant: 'No.'

Defence counsel: 'That you punched him in the face?'

Complainant: 'I was trying to push him off.'

Defence counsel: 'Right. Scratch his back?'

Complainant: 'No.'

Defence counsel: 'I take it that you were screaming out "help me, save me"?'

Complainant: 'I was crying.'

Defence counsel: 'Were you screaming, yelling for help?'

Complainant: 'It wasn't much use yelling for help.'

Defence counsel: 'I'm sorry, were you screaming for help?'

Complainant: 'No.'

Defence counsel: 'Thank you. So you didn't scratch him?'

Complainant: 'No.'

Defence counsel: 'Bite him?'

Complainant: 'No.'

Defence counsel: 'Punch him?'

Complainant: 'No.'

Defence counsel: 'Scream?'

Complainant: 'I could have screamed, but -'

Defence counsel: 'You could have done'.¹¹¹

The third extract is taken from a case that involved a complainant and an accused who, some time prior to the events tried, had been engaged to be married. Their relationship had been turbulent, and at times, violent. As a result, the complainant broke off the engagement and obtained a court restraining order against the accused. The Crown case was that, on the night of the offences, the accused forced his way into the complainant's house at 3:00 am. He confronted her wielding a knife and accused her of having had relationships with other men whilst engaged to him. The jury acquitted him of a charge of rape but convicted him of a charge of aggravated burglary.

¹¹¹ Case number 7.

Extract Number 3

Defence counsel: 'Now shortly after that I think you've said he simply picks you up and carries you into the bedroom?...'

Complainant: 'Yep.'

Defence counsel: 'And I think you said he cradled you or something?'

Complainant: 'Yeah, had me in his arms.'

Defence counsel: 'Right. Now you didn't fight him or punch him or do anything to stop that did you?'

Complainant: 'No, I couldn't move, I couldn't breathe properly.'

Defence counsel: 'You suffer from asthma do you?'

Complainant: 'No, I just couldn't breathe properly that night.'

Defence counsel: 'Do you have any medical ailment that causes breathing problems?'

Complainant: 'No.'

Defence counsel: 'So he lifts you up out of the chair, are you saying you just couldn't respond in any way?'

Complainant: 'I'd just got myself into that much of a state, I was that scared that I just couldn't breathe properly.'

Defence counsel: 'And that led to you not doing anything to try and stop that?'

Complainant: 'Yep.'

Defence counsel: 'And in fact you didn't necessarily want to stop him carrying you to the bedroom, did you?'

Complainant: 'No, I wanted it stopped. I didn't want him there from the very first second.'

Defence counsel: 'But apart from once when you said you were cold and would he go now, there was no obvious attempt to have him leave, was there?'

Complainant: 'I asked him. I asked him twice and then I asked him twice at the end.'

Defence counsel: 'Well we haven't got to the end but I'm saying at the time he carried you to the bedroom has there been any obvious attempt before then to ask him to leave?'

Complainant: 'I asked him right at the beginning when he asked me about was I going to tell the police whether he was there, then I asked him again when I told him I was cold and tired, and then when I was on the bed and he was sayin' again - when I was sayin' "I can't, I can't" I said "just go."'

...

Defence counsel: 'You rebuffed that did you or you pushed that away when that happened?'

Complainant: 'I could hardly move I was just too - I don't know - I don't know how, I didn't know how to deal with it I suppose, all I could do was just lay there and practically cuddle myself and say "I can't, I can't, I can't."'

Defence counsel: 'Why didn't you get up, you're fully clothed at this stage aren't you?'

Complainant: 'Yes.'

Defence counsel: 'Why didn't you get up and walk out and go next door to Mum and bang on the door?'

Complainant: 'First of all she wouldn't have heard me, but he was standing there with a knife in his hand and what was I supposed to do?'

Defence counsel: 'Well I suggest that you're wrong as to the knife in his hand, that that's just something you're mistaken about, that the knife was never in his hand in the bedroom at all?'

Complainant: 'It was there.'

Defence counsel: 'What do you say was the effect of it then?'

Complainant: 'Scared the hell out of me.'

Defence counsel: 'So you've indicated that the situation has developed to the point where he thrusts his penis at you and then he lies on the bed?'

Complainant: 'Yeah.'

Defence counsel: 'On his back?'

Complainant: 'Yeah.'

Defence counsel: 'And did you see that as an invitation for you to do something?'

Complainant: 'No, he told me to sit up.'

Defence counsel: 'Sit up, yes, and what then were you told to do?'

Complainant: "Do it. He said "Are you going to do what I tell you or am I going to have to make ya?" and I just kept saying "I can't, I can't, I can't".¹¹²

An interesting feature of the cases where the complainants were cross-examined about lack of resistance is that in the majority of them the complainants had, in fact, put up considerable physical resistance at some time during the attack. For example, in the case from which the first Extract above is taken, the complainant had made a determined effort to escape the accused, even to the point of injuring herself by jumping from a moving motor vehicle and attempting to arouse the attention of, and get help from, people in a nearby house. In the case from which the second Extract is taken, the complainant had resisted the accused's attempts to remove her from the car. She had struggled and kicked one of them. She had attempted to crawl into the driver's seat, clung to the steering wheel to prevent one accused from taking her from the vehicle and tried to persuade the driver to drive her away. Her own account of her conduct was corroborated by the testimony of the driver of the car who decamped before the sexual offences were committed. In other cases, complainants had offered similar resistance and yet, because that resistance was either exhausted or driven to a stand-still by the time the sexual offences occurred, the accused still took the opportunity to portray the complainants' final lack of resistance as consent.

This approach seems to be based upon the notion that high levels of violent conduct on the part of accused and high levels of resistance on the part of complainants preceding final submission can reasonably be consistent with freely given consent. A number of commentators have pointed out that it is an approach that is supported by prevailing standards concerning acceptable levels of force in sexual relations. These standards, it is argued, view much coercive conduct as commensurate with seduction rather than compulsion.¹¹³ It is a view that has found expression in standard text-books on criminal law. For example, in *Howard's Criminal Law*, Fisse wrote that 'outward reluctance to consent may be no more than a concession to modesty or a deliberate incitement to D to persuade a little harder'.¹¹⁴

A particularly invidious element of this approach is that, implicitly, it relies upon the notion that complainants' refusal of consent, whether communicated verbally or by physical resistance, may be regarded as deceptive and, therefore, discounted or ignored. According to this approach, complainants' 'no' may still evidently not be regarded as 'no'. Additional resistance appears to be required. The following cross-examination extract illustrates these points:

¹¹² Case number 48.

¹¹³ N Naffine, (1997) *Feminism and Criminology*, Sydney: Allen and Unwin, p 110.

¹¹⁴ B Fisse, (1990) *Howard's Criminal Law*, Sydney: Law Book Company, p 178.

Defence counsel: 'Right, well did you tell him to go away at all in June '94? On this day, the twenty third?'

Complainant: 'I told him not to touch me.'

Defence counsel: 'Did you endeavour to get up and leave?'

Complainant: 'He was sitting on me. I couldn't have got out. He would have grabbed me.'

Defence counsel: 'Did you try?'

Complainant: 'I was scared. I couldn't move. I felt like I was paralysed.'

Defence counsel: 'Right. Did you try though?'

Complainant: 'No.'

...

Defence counsel: 'Well, what did he say?'

Complainant: "'I'm going to see how tight you are".'

...

Defence counsel: 'Well, at that did you endeavour to get away?'

Complainant: 'I was crying. I couldn't move. Have you ever tried sitting there when someone is there saying that to you and you just – you can't move. You're paralysed. You can't move'.¹¹⁵

The cases extracted in this section demonstrate how defence counsel, in cross-examination, can construct lack of physical resistance or lack of particular forms of physical resistance on the part of the complainant as either evidence of consent or as providing the foundation for a mistaken belief in consent. This construction would not be readily available if s4(g) of the Criminal Code Amendment Bill (1999) (Tas)¹¹⁶ were enacted. The reform contained in this Bill requires trial judges to direct juries that a person is not to be regarded as having freely agreed to sexual contact just because she or he did not protest or physically resist. Trial judges must also tell juries that the fact that a person did not do or say anything to indicate free agreement is normally enough to show that the act took place without that person's free agreement. In addition, under the Bill 'consent' is defined as 'free agreement'.¹¹⁷ It is difficult to see how passivity, silence, or lack of resistance could be viewed as conveying free agreement or as providing a foundation for any belief by the accused that the complainant had conveyed her agreement to sexual intercourse.

¹¹⁵

Case number 10.

¹¹⁶

This Bill is modelled on s37 of the *Crimes (Rape) Act* 1991 (Vic.)

¹¹⁷

Criminal Code Amendment Bill 1999 (Tas), s4(a).

Chapter Four: Judicial Construction of Consent and Mistaken Belief in Consent

4.1 Introduction

Trial judges' constructions of consent and mistaken belief in consent are contained in their summations to the jury. The trial judge's summation occurs at the end of the trial after Crown and defence counsel have given their closing addresses to the jury. Its purpose is to interpret the law for the jury, to elucidate the issues in the case, to relate the evidence in the case to those issues and to explain what inferences may properly be drawn from the evidence.¹¹⁸ The summation is required by the law to be dispassionate and impartial.¹¹⁹ Any evaluative comments on the evidence and facts of the case must be couched with care because they are likely to weigh heavily with juries.¹²⁰

For all trials in the present study in which consent was in issue, the trial judges' summations were examined to determine how the concepts of consent and absence of consent were explained to the jury. This analysis involved two steps. First, the general explanations of consent provided by the judges were considered. Second, the interpretations provided of the vitiating circumstances in s2A were analysed. A similar analysis was undertaken in relation to the defence of mistaken belief in consent. First, its general interpretation was examined. Then its application to particular facts was considered.

When considering the general explanations of consent given by trial judges, the study was particularly interested to learn whether the concept of consent was ever interpreted as involving elements of mutual agreement between sexual partners. Also of interest in this context was whether trial judges ever took the view that consent may be given reluctantly or grudgingly and, nevertheless, still be considered to be freely given. This particular approach to consent, which has found expression in some Australian cases,¹²¹ has been criticised as not giving adequate recognition and support to the sexual autonomy and mutual rights of sexual partners.¹²²

The study also examined how trial judges dealt with evidence that was identified as relevant to and revealing of the existence or non-existence of consent and the accused's state of mind or state of belief. Inevitably the analysis here threw up particular categories of evidence for consideration. These included evidence of pre-trial admissions that may have been made by the accused to the police, evidence of passivity or lack of resistance on the part of complainants, evidence of force or violent behaviour on the part of accused and evidence of verbal communications between complainants and accused.

In examining these matters the researchers were also concerned to learn whether and how, when summing up to juries, judges dealt with a number of issues relating to consent and

¹¹⁸ *Alford v Magee* (1952) 85 C.L.R. 437 (High Court of Australia); *Lawrence* (1981) Cr.A.R. 1 (House of Lords); *Tegg* (1982) 7 A.Crim.R. 188 at 200 (Tasmanian Court of Criminal Appeal); *Jellard* [1970] V.R. 802 at 804 (Supreme Court of Victoria); *Schmahl* [1965] V.R. 745 at 747 (Supreme Court of Victoria).

¹¹⁹ *Ali Ali* [1981] 6 A.Crim. R. 161; *Tegg* (1982) 7 A.Crim.R. 188; *Courtney Smith No. 2* (1990) 48 A.Crim.R. 49.

¹²⁰ *Cunningham v Ryan* (1919) 27 C.L.R. 294; *Broadhurst* [1964] A.C. 441.

¹²¹ *Holman v The Queen* [1970] W.A.R. 2 at 6 and see the unreported cases extracted in Department for Women, New South Wales, (1996) *supra* p 264.

¹²² See for example statements by Burt CJ of the Western Australian Supreme Court in *Ibbs v The Queen* [1988] W.A.R. 91 at 93 that it would be a serious misdirection to tell a jury that a 'hesitant, reluctant, grudging or tearful consent' could be said to be freely given.

mistaken belief in consent that, in recent years, have been identified as controversial or problematic. These are, first, the notion that passivity or absence of resistance on the part of complainants can be equated with consent, second, the view that complainants have a responsibility to communicate absence of consent clearly without there being a accompanying responsibility upon an accused to take steps to ascertain consent, third, that evidence of physical injury or damage to clothing is a reasonably expected concomitant of genuine non-consent.

The overall aim of this part of the study was to gain an understanding of trial judges' views concerning consent and mistaken belief in consent, what facts may reasonably be considered to vitiate consent within the meaning of s2A of the *Criminal Code* and what facts may reasonably give rise to the defence of mistake. In other words, what was sought to be understood was the working operation of the consent and mistake provisions in the Code as interpreted by trial judges.

This part of the report begins by looking at the general explanations of consent and mistaken belief in consent given in the trial judges' summations. It then discusses those categories of evidence identified as having particular relevance to the determination of consent and mistaken belief in consent and, in doing so considers particular, controversial aspects of that evidence.

4.2 General Interpretation of Consent

In the majority of cases, the trial judges' consideration of the general concept of consent was confined to the terms of s2A. The section was recited to the jury¹²³ and then some explanation provided, by way of example, of the types of conduct that would come within the vitiating circumstances in subsection (2). Subsection (3) of s2A was not mentioned by any of the trial judges in the cases examined in the present study. In thirteen cases, analysis of the concept of consent beyond the terms of s2A was attempted. Two themes emerged in this regard: that consent should not be equated with submission and that consent can be indicated in a variety of ways other than by express verbal agreement. In no case was consent described in terms of free or mutual agreement. In one case the trial judge expressed the view that consent may be reluctantly given and yet, nevertheless, freely given. The relevant portion of the summation in this case is set out in Extract Number 8 below.

4.2.1 Consent is not submission

In nine cases, the trial judges stressed that consent is not to be equated with mere submission or lack of resistance. In six of these cases, submission was related to the effect of force or threats upon the complainant so that it was submission to force and threats rather than submission simpliciter that was said not to constitute consent. In the remaining cases, the direction that submission is not consent was given independently of any reference to force or threats. Extracts numbered 1, 2, 3 and 4 below illustrate the first construction. The remaining Extracts illustrate the second.

¹²³

Juries are also given a written memorandum setting out s2A of the Code as well as those sections that define the crimes with which the accused has been charged. The mistake provision in the Code, s14 may also be provided.

Extract Number 1

'...the law tells us that consent is not freely given if it is procured by force or threats of any kind. So submission under threat is not consent. If you give in to force or, even if actual force is not used, you give in to a threat and do what is demanded of you by the person making that threat, that's not consent. It's submission and not consent'.¹²⁴

Extract Number 2

'What is important here is, it is not procured by force or threats of any kind. That's the rape which is alleged here. She didn't consent. And even if she consented by moving her body – she says she didn't – but even if she did or didn't fight back enough – why? Because there's not passivity. It's freely given where it's not procured by force or threats of any kind'.¹²⁵

Extract Number 3

'...any apparent consent which is produced as a result of force or threats or the two of them combined is not consent at all in the eyes of the law. In other words, submission is not consent. Submission to the inevitable is not consent....to submit to the inevitable is not consent'.¹²⁶

Extract Number

'Consent is not freely given where it is procured by force or threats of any kind. That's simply telling you what is obviously common sense. Submission is not consent. If someone threatens you and rather than running the risk of incurring serious injury you submit to intercourse by that person, you have not consented to it in the eyes of the law. That is intercourse without consent'.¹²⁷

Extract Number 5

'Well, consent means – “consent freely given by a rational and sober person” who is in a position that they're able to form a rational opinion upon the matter to which consent is given. In other words, it's not just, in the end not struggling'.¹²⁸

Extract Number 6

“And our law provides quite clearly that consent means consent freely given. It does not mean submission. It does not mean giving up and letting someone do what they want to do to you which you don't want them to do”.¹²⁹

Extract Number 7

'So, it's a question of whether there has been a freely given consent, not just a submission, a freely given consent by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which consent is given'.¹³⁰

Extract Number 8

In contrast, in one trial the judge accepted that sufferance or reluctant resignation would constitute consent. He said:

'...I would imagine that in some domestic situations intercourse occurs when one or other partner doesn't really want it, but, yet they consent. That partner consents, allows it to occur. So not wanting it and consenting to it, I suggest to you, involve two different concepts. Preferring not to but allowing it to happen involves consent'.¹³¹

¹²⁴ Case number 32.
¹²⁵ Case number 6.
¹²⁶ Case number 13.
¹²⁷ Case number 26.
¹²⁸ Case number 25.
¹²⁹ Case number 7.
¹³⁰ Case number 35.
¹³¹ Case number 31.

4.2.2 Consent need not be stated

In three cases, the trial judges indicated that consent can take a variety of forms and that consent might be found to have been given even though the complainant did not give express verbal consent. In none of these cases, however, did the trial judge then explain this direction by reference to examples of the complainants' actual conduct in the cases at hand. Rather the juries were left to determine without assistance what, if any, conduct on the part of the complainant or what circumstances in the case at hand might indicate tacit consent.

Extract Number 1

'Consent doesn't have to be given orally. You don't have to say, "Yes, I consent to your doing this". You can, by your behaviour, give consent. If a woman plainly enjoys the touching which is going on and responds to it, it's a very obvious situation in which consent is being given you might think. So, consent doesn't have to be spoken. It can be implicit in the conduct of the person who is allegedly assaulted'.¹³²

Extract Number 2

'Now consent can be conveyed in various ways. It can be by words or by conduct and there is no suggestion here by anyone there was any express consent by words given. There was no suggestion by the accused when he was interviewed that he asked the complainant whether he could penetrate her vagina with his finger and she said yes, no suggestion like that at all'.¹³³

Extract Number 3

'I must also tell you, of course, that consent need not be spoken. In other words, you don't have to say "yes, we will have sex", or "yes, we will do this". If in all the circumstances it's apparent that consent was being given tacitly to what was going on that would be an appropriate basis for you to conclude that consent was being given. You don't have to articulate the words, 'yes, I consent' for consent to be present. ...consent need not be spoken, it can be manifest by conduct'.¹³⁴

4.3 Force and Threats

In the majority of cases (82%) the Crown relied upon evidence of force, threats and violence to substantiate the complainants' assertions of non-consent. The present study was concerned to learn how trial judges dealt with the issues of force and threats when summing up to juries. A principal task in this analysis was to learn the types of threat and force that the trial judges depicted as vitiating consent.

Section 2A provides that force and threats 'of any kind' may negate consent. However, the precise scope of this provision remains controversial. It has been argued, on the one hand, that to extend the force and threats covered by this provision beyond actual and threatened physical violence or injury to any kinds of force and threats would diminish the seriousness of rape and allied sexual offences.¹³⁵ On the other hand, it has been suggested that to restrict the meaning of force and threats to physical coercion eliminates other types of coercion that may be equally effective in precluding a truly free consent.¹³⁶ The examples cited most often in support of the latter argument are the threatened destruction of the complainant's reputation and threats of economic harm. The extent to which trial judges' summations favoured one or other of these approaches was, therefore, of interest in the present study.

¹³²

Case number 5.

¹³³

Case number 30.

¹³⁴

Case number 13.

¹³⁵

J Temkin, (1982) *supra* p 411.

¹³⁶

LR Harris, (1976) 'Towards a consent standard in the law of rape', *University of Chicago Law Review*, Vol 43, p 613 at p 643.

The present analysis of trial judges' approach to force and threats was also directed by two other specific issues identified from the pre-law-reform debate. First, there was the clear aim of those involved in the law reform process to achieve a departure from the stereotyped conception¹³⁷ of rape and like sexual offences as necessarily involving the physical subjugation of the victim through the application of physical violence or threats of physical violence.¹³⁸ This aim, therefore, provided a checkpoint for the present analysis of the summations.

A second equally important aim for a number of groups involved in the pre-reform debate and in the law-reform process was to achieve a displacement of the presumption of consent in cases where there was evidence of force or threats.¹³⁹ While this aim did not gain legislative recognition in the reform enacted, nevertheless, in the present study, it also provided a useful checkpoint for evaluating judges' approaches to the issue of force and threats.

4.3.1 Judges' depiction of force and threats

In the cases examined, the judges universally described the concepts of force and threats in s2A in terms of physical harm. Other forms of threatened harm were not mentioned. Illustrative examples of the kind of description provided are contained in the following extracts from 2 trials in the present study:

Extract Number 1

'Similarly, if a person demanded sexual intercourse of a woman holding a loaded gun at her head and she offered no physical resistance because her will was overborne by the threat, she couldn't be said to consent'.¹⁴⁰

Extract Number 2

'If an intruder stands over you in your bed with a knife and says "Let me have intercourse with you" and you submit through fear of being injured by the knife, that's obviously not consent'.¹⁴¹

The restriction of the examples given to physical force and threats of physical harm is perhaps explicable on the basis that they comprise the most readily understandable instances of force and the least challenging to commonly accepted views. Furthermore, these examples were more relevant than other types of force and threats to the particular factual issues before the juries because, in all cases where the issue of force or threats arose, only evidence of physical harm/coercion was adduced. Consequently, the restriction of the trial judges' examples to physical force and threatened physical harm cannot be taken to indicate a narrow judicial interpretation of force or threats.

4.3.2 Rape does not necessarily involve force, threats, violence or resistance

The aim to dispel the view of rape as necessarily involving the infliction or threatened infliction of physical force or injury or the application of violence was reflected in a number of summations where trial judges directed juries that rape is not confined to cases involving violence, injury or physical force. In such cases, the trial judges were clearly concerned to dispel any misconceptions or assumptions that juries might have concerning the concept of

¹³⁷ Ibid.

¹³⁸ See, for example the discussion on this point in Model Criminal Code Officers' Committee, (1999) *Model Criminal Code, Chapter 5: Sexual Offences Against the Person, Discussion Paper* supra p 31.

¹³⁹ CA Warner, (1981) supra pp 24-29.

¹⁴⁰ Case number 9.

¹⁴¹ Case number 14.

rape, for example, that real rape necessarily involves violence. The following Extracts illustrate this trend.

Extract Number 1

'Some people think that rape necessarily involves an application of force. In the eyes of the law it does not. It's not forcible sexual intercourse. It's intercourse without the consent of the other person involved in the sexual act. So, it's consent or no consent with which we are concerned, not with any degree of force which might be involved. Force may, of course, be a very important evidentiary matter for you to consider. If there is obviously a great deal of force used to accomplish the sexual act, it may be an easy matter to persuade a jury that the sexual act was not with the consent of the person upon whom the force was used. So, it has evidentiary significance in that way, but in terms of legal concepts, rape simply consists of sexual intercourse by one person upon another person without that person's consent'.¹⁴²

Extract Number 2

'It is not, and I stress this because I've seen it on television programs from time to time – you should not have the concept that rape means intercourse accompanied by actual violence. That's not our definition of rape. Our rape is sexual intercourse without the consent of the person who is allegedly the victim. And this means, of course, just to give you an illustration – you could be guilty of rape if you entered the bedroom of a sleeping woman and with no force at all pretended to be her husband and had intercourse with her. That would be, in the eyes of the law, a rape even though there was no force at all involved. It's the absence of consent which is important, not the presence of actual violence'.¹⁴³

Extract Number 3

'Many laymen and women, I think, tend to think that rape only occurs if there is an actual overcoming of a woman by physical force and intercourse results after that but that's not what the law looks at. It looks at the question of consent. So, you don't look necessarily at the question of violence, although that is always relevant, of course, in cases where has been alleged, but the question is whether there was consent on the part of the person who claims to have been the victim'.¹⁴⁴

Extract Number 4

'Actual violence is not an essential ingredient to rape. Sometimes, of course rape is carried out as the result of violence, actual or apprehended. But it is not an essential ingredient. You can commit rape if you get into bed with a sleeping woman who's just lying there asleep and vaginally penetrate her with your penis. That is rape although you haven't had to subdue her. You haven't directed her mind in any way to whether she'll consent or not, but it's plain that in those circumstances you've had sexual intercourse with her without her consent. So, in the eyes of the law to do that is rape. So, I'm stressing this because again I think it may be a common misapprehension in the community that rape only occurs where someone is beaten into submission. That's not necessarily so. Rape, the essence of rape is sexual intercourse without the consent of the person upon whom the rape is alleged to have taken place'.¹⁴⁵

4.3.3 Force, threats, violence and injury not treated as rebutting the presumption of consent

The study found that none of the judges in the trials examined went as far as treating evidence of force or threats as *prima facie* displacing the presumption of consent.

The common practice of trial judges when dealing with the issue of forced submission to sexual contact was to explain, by reference to generally applicable examples, rather than by reference to the particular facts in issue, how and why compliance resulting from force or

¹⁴² Case number 15.

¹⁴³ Case number 13.

¹⁴⁴ Case number 29.

¹⁴⁵ Case number 7.

threat is not treated in law as genuine or valid consent. Typical examples of this are provided by the following statements from the judges' summations in two cases in the present study:

Extract Number 1

'Again, you may think that makes common sense that if someone holds a gun to your head and says, "you know, unless you consent to whatever it is I'll shoot you" and you then say, "I consent", well, the law doesn't regard that as consent and I assume you wouldn't expect the law to regard it as a consent, because it would be a consent which would be procured by threats, the threat, "I'm going to shoot you unless you consent". It's got to be free'.¹⁴⁶

Extract Number 2

'And consent is freely given where it is not procured by force, fraud or threats of any kind. If it is procured by threats or force then it is not a true consent. It is without the woman's consent. So, if a woman says, "no", she's then bashed into submission say, and she just lets the man do it only because of that force or because of threats – then it would not be intercourse with consent. It would be rape'.¹⁴⁷

Having explained the operation of the law relating to force in general terms such as these, the judges then summarised the complainants' and the accuseds' competing accounts of the events in issue. During this process reference was generally, though not always, made to particular items of evidence relied upon by the defence and the Crown to deny or establish force or threats. The judges' comments on this evidence rarely explicitly evaluated it in terms of its possible impact one way or the other on the jury's determination of consent. Instead, it was usually treated as something to be taken into account by the jury in assessing the presence or absence of consent. Extract Number 1 below illustrates this approach.

However, in five cases, the judges did provide a more evaluative approach and related the evidence more closely to the issue of consent, suggesting possible implications of that evidence for that issue. The relevant portions of these summations are set out below in Extracts 2 - 6. While comment in these terms hovers in the direction of suggesting that the Crown evidence might be taken to displace any presumption of consent, it does not actually reach that point.

Conversely, trial judges might also comment that Crown evidence of violence and injury is not necessarily indicative of lack of consent but might be ascribed to causes other than forced sexual intercourse. Extract Number 7 provides an example of a judicial summation in those terms.

Extract Number 1

'Well now, the only possible, possible justification on the evidence in this case is consent. You see, on his account, he did apply quite a bit of force to his wife, but he said it was all consensual. It was in the course of lovemaking. People apply force by consent to one another every day in every circumstance. You see it at York Park every winter Saturday, I suppose. You see it in the boxing ring. You see it when the surgeon puts the scalpel in to make the operation. All those are applications of force. They are direct and intentional applications of force but they are justified in law, and they are justified in law because consent was given'.

¹⁴⁶ Case number 30.

¹⁴⁷ Case number 23.

Towards the end of the same summation, the trial judge continued:

'You will consider the evidence, which doesn't seem to be in dispute, about the bruising on the body and the explanation from the complainant as to how she got that bruising and the inability of the accused to account for bruising on his body, or for that matter on hers, except for the one in relation to the buttock when, of course he said he bit her – but you heard all that evidence about what kind of bite it was. So, the bottom line in this case, it seems to me, ladies and gentlemen...the fundamental point in this case, with respect to each count, is that you can't find this man guilty unless you are satisfied beyond reasonable doubt that the complainant was, in substance, a truthful and accurate witness. However, in considering that question, it is perfectly legitimate for you to look at the other evidence of course. Indeed, the recent complaint, whether you think – not that that it proves that it happened – but is that in conformity with her conduct? Is it in conformity with what she said happened? On the distal side, you might consider Mr T's point as to whether, if it happened as she said, why didn't she run out onto the West Tamar Highway, or jump in her car and drive off, you see? He put that point to you. You will consider that. You will consider, in particular, no doubt what seems to me to be the undisputed medical evidence of her body and the accused's body. You will consider the evidence from the police officer and the mother about her distressed condition'.¹⁴⁸

Extract Number 2

'Well you might think that the presence of the gun is an important component in this particular interlude. You might conclude, as [Crown counsel] invites you to conclude, that if the gun was there and if indeed she was expecting to be killed rather than raped it would rob that intercourse of any element whatsoever of consent because of the threat under which she felt she was being placed and, of course, you would have to consider that. On the other hand, [defence counsel] suggests that the gun was not in the bedroom when they were in the bedroom and that no matter what had occurred before, by that stage things had quietened down a lot and anything which occurred before then, even though it was denied that anything had happened in the bedroom, but certainly what occurred out in the other room could properly be regarded as by consent at that stage of events. Well, you've got to think about that obviously'.¹⁴⁹

Extract Number 3

'If you accept, if you accept without doubt, without reasonable doubt that [the complainant] had been assaulted by [the accused] in the way the evidence suggests, earlier, do you really think it's a possibility that she consented to sex in that paddock only shortly after? I remind you that consent obtained through force or threats is not a consent in the eyes of the law'.¹⁵⁰

Extract Number 4

'I'd suggest that you seriously considered what (sic) seems to be undoubted objective facts in this case and I use that expression as meaning that there doesn't seem to be much in dispute that those facts do in fact, - are facts. Firstly, that [the complainant] had a restraint order which required him to keep away, so many hundred yards away, or whatever, and [the complainant's sister] too. They both had had them. That he parked his car well away from the house that night; that he then went to the house, a distance, quite a long distance he travelled with a bag containing ropes – someone tells me they are tarp ropes – little short lengths with little loops at the end used for tying tarpaulins down. You might know. I don't know myself. Anyway, a bag containing ropes, tape, knife, the gun or the stick, a scanner, which, I think, in his interview he said he had to listen to the police. Why would he be taking these things going to that house that night? The question is for you. He cut the telephone. Why would he be doing that? Before he entered, he didn't know whether she would talk to him or not. He wanted to talk to her he says. Why did he cut the telephone? He smashed the window. He entered without consent. He tied up [the complainant's sister]. He put tape over her mouth. It is a matter for you whether he forced [the complainant] to go in the car with him, but when she jumped out and tried to run away what did he do? He ran after her. He ran round that house after her and he caught up

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Case number 1.

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Case number 27.

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Case number 23.

with her and he got her back into the car. And they got into the shed, as I understand the evidence, and once they got in there he locked the shed. Why? He wanted to talk to her. Why? I can't actually remember that evidence but [defence counsel] referred to that I think in his address to you. And then, finally, I just refer to the undoubted fact that she was injured. She had lacerations. Hit that road and hit her head. She was hobbling. She had injured her ankle and she was hobbling. And yet she is consenting to sex, it is said, once they were in that shed. And this was – why is that stick, gun, whatever it is up there on the bales of hay at that time? Because, on his own evidence, it was up there and on her evidence it was up there. So they're what I might describe as objective facts and are, it seems to me, quite substantial ones and it may be that they speak very loudly to you'.¹⁵¹

Extract Number 5

'Of course, if he acted as she said he acted, that is by slapping her about the face and having sexual intercourse in the way she described, it may be fairly obvious to you that there was not consent in that case'.¹⁵²

Extract Number 6

'Now it seems to me, but you might think differently, that the medical evidence is very important in this case, very important to you in weighing up whether you are satisfied beyond reasonable doubt that the complainant was a witness of truth and accuracy. And you will remember that Dr H. gave evidence...[the trial judge then described in detail the complainant's injuries: swelling and tenderness to the nose and forehead, scratch mark on the neck, three centimetres long, a one centimetre scratch in the midline at the back of the neck, redness and tenderness below the right ear, three to four centimetres in size, bruising to the arm and a red mark on the wrist, scratches on the leg and an area of redness on one leg as well as bruising, a scratch on the left buttock and redness and tenderness on one toe. There were small red marks across the abdomen, grazes on the genital area, redness and maceration at the back of the vaginal opening]...No doubt you will have regard to that evidence as well as all the other evidence in assessing this essential question of credit. ...[The accused] then told you that the complainant said that she then wanted to go on top ...[The trial judge then detailed evidence concerning a love bite allegedly given to the accused by the complainant] ... Now it really is again so important, you see, to assess the credit of that young woman, [the complainant], because you have got to consider all of the evidence and say, well, what is the probability of that occurring, what is the likelihood of her getting on top after that having regard to her injuries to the vaginal area and not wanting to desist with intercourse and indeed giving him a love bite, bearing in mind the evidence that describes her in tears and complaining of rape within what seems to me to be a very short time thereafter. But they are matters for you to consider. They are comments from me and you have heard me say it so many times now, the facts are always for you and not for me'.¹⁵³

Extract Number 7

'I've mentioned the throwing about the bed which she alleged. Do you believe it? It's a matter for you. You may consider it exaggerated. Now there's evidence before you of bruising and tenderness to various parts of [the complainant's] upper body and also some markings to the vaginal area. There's evidence of some of those things being consistent with the account given by the complainant. Well, all that consistent means, of course, is that it doesn't disprove her story. It doesn't mean that it actually proves what she has told because a particular bruise, for example, may be consistent with it having been caused in a particular way. It may equally be consistent with a lot of other things. Now you might consider the sign of some slight injury to the vagina as being consistent with an act of intercourse and, of course, the accused admits an act of penetration, so it's possibly related to that. We don't really know what else it might be consistent with, of course. But you may consider more important the evidence of bruising and tenderness or tenderness to the upper body, bruising to the leg and to the upper body, the various bruises described by medical witnesses, and, of course, they're to be seen in the

¹⁵¹ Case number 13.

¹⁵² Case number 25.

¹⁵³ Case number 17.

photographs. Now, on the evidence which the accused gave you, of course, there is another explanation why [the complainant] may have been suffering from bruising and tenderness and that is his evidence as to the altercation involving some physical violence between [the complainant and her husband] on the occasion that Mrs T was on the telephone. Now, if you think that might reasonably be true, you don't have to be satisfied that it is, then, of course, you really couldn't place any reliance on those signs of injury or trauma as supporting [the complainant's] case'.¹⁵⁴

Extracts 2-6 above beg the question whether it might not be appropriate in cases involving evidence of violence, injury and threatened physical harm for the trial judge to indicate to the jury that if such evidence is accepted by them, then consent might be deemed not to exist. Arguably a direction of this kind would have been justified in all the cases from which these Extracts were taken. All involved significant levels of violence. In the case from which Extract Number 2 was taken, the accused had threatened the complainant with a loaded rifle, at one point firing it towards her head into the chair on which she was sitting. The complainant in the case from which Extract Number 3 was taken had been abducted by three accused and bashed unconscious. In the fourth and sixth cases, the violence and injuries inflicted upon the complainants are outlined in the Extracts. In the fifth case, the complainant had been strangled and her hair pulled. She had been bitten on the buttocks and thrown against a wardrobe and onto the floor. The accused had threatened to punch her in the face and to kill members of her family.

In circumstances like these it may be justifiable for the trial judge to direct the jury that the Crown evidence, if accepted, would not be consistent with consent freely given. Not to direct the jury in that way may leave the impression that a significant level of force, injury and violence can reasonably be consonant with consensual sexual contact. It also leaves it open to juries to decide that such force has no operative effect at all in relation to consent. This type of approach is evident in those cases where the defence suggested that whatever force had been applied by the accused during the course of the events in question, it had either ceased or ceased to exert any influence over the complainant by the time that sexual intercourse occurred. This construction was placed on the events in the cases from which Extracts 2 and 4 were taken.¹⁵⁵

The Code itself appears to leave open the possibility that violence, force and physical injury may be compatible with consent. Under s2A, the only circumstance where evidence of violence or injury can be treated as *prima facie* establishing absence of consent is where that violence has produced or the injury amounts to grievous bodily harm. 'Grievous bodily harm' is defined in s3 of the Code as being any 'bodily injury of such a nature as to endanger or be likely to endanger life, or to cause serious injury to health'. Lesser injuries, lesser forms of violence, even though serious, do not give rise to such a *prima facie* conclusion. As earlier analysis here has shown, s2A(3) appears to play little practical role in Tasmanian sexual offences trials. In no case in the present study was it resorted to by the Crown to establish absence of consent.

This begs the further question, whether it is not now appropriate to revisit the issue of coerced consent and inquire whether the s2A in its present form does not countenance an outdated approach to force and threats in the context of sexual encounters, an approach that does not adequately protect genuine freedom of choice in sexual relations. This conclusion is reinforced by the fact that the relatively conservative *Model Criminal Code Report on Sexual*

¹⁵⁴ Case number 19.

¹⁵⁵ See also the discussion at para 2.6.4 above.

Offences Against the Person recommends that the Model Code deem consent to be absent where force or threats of force are used.¹⁵⁶

It is submitted that the definition of 'consent' as 'free agreement' contained in s4(a) of the Criminal Code Amendment Bill 1999 (Tas) may go some way to altering perceptions about what constitutes real consent in the context of sexual relations and about the role of force in that context. The proposed definition aims to incorporate elements of mutuality into the concept of consent. Arguably, force and mutually free agreement are mutually exclusive concepts. The problem with the term 'consent', is that it appears to retain, tenaciously, despite trial judges' often careful directions to the contrary, a residual component of submission, of one person giving in to the wishes of another. The term 'free agreement' contains no such connotations. Therefore, it may oust the possibility that force can play any legitimate role in sexual encounters.

4.4 Fraud

The question of whether consent had been vitiated by fraud arose in only one trial examined in the present study. This case involved an alleged fraudulent medical examination of the complainant's penis by the accused. The Crown alleged that the accused induced the complainant to believe that he was engaged in a legitimate diagnostic procedure in masturbating the complainant's penis when, in fact, his acts were performed solely for his own sexual gratification. At the time of the examination, the complainant was in hospital for an operation for testicular cancer. He was visited by the accused, a medical student, who was wearing a white coat, shirt and tie and an identification badge. The accused asked the complainant many personal questions about his normal sexual activity and then examined his genitals by pinching and rubbing the head of his penis and taking hold of its shaft. He repeated this activity holding a towel around the complainant's penis. The complainant told the accused that he felt uncomfortable about what the accused was doing and the accused then asked him to masturbate himself. Other doctors had not examined the complainant in this manner. The accused returned the following day, bringing the complainant two chocolate bars, and gave him his address. A few days after the complainant had been discharged from hospital, the accused visited him at his home. The complainant told him to leave.

The Crown also put this aspect of their case upon the alternative basis that consent was vitiated because the complainant had been mistaken as to the character of the accused's conduct, his mistake having been induced by the accused's behaviour and demeanour. The trial judge summed up these issues to the jury as follows:

'...you'll remember that he said that he was uncomfortable about it and you might infer from the evidence that he agreed, at least in part, because of the situation in which he found himself. ... As I understand the Crown's case as it's presented to you, it's this, it's done on an alternative basis, as I see it. The Crown is saying [the complainant] didn't consent to the accused's masturbation of his penis because he was unaware of or mistaken about the character of the act that was being performed. He thought it was a legitimate diagnostic process, or a legitimate medical process, whereas, in fact, the Crown would say, based on [the specialist medical practitioner's evidence] and the nature of what, in fact, occurred – in light of that evidence, that it was an act of some form of sexual gratification by the accused for his own purposes. So, the Crown says that the character of the act was not that which was being represented to [the complainant] by the activities and attitudes being adopted by the accused at the time. The

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Model Criminal Code Officers' Committee, (1999) *supra* pp 39-51. The recommended provision in the Model Code may, in practice, fall short of achieving this outcome. In its present form it may well be interpreted as not, in fact, constituting a true deeming provision. Nevertheless, the discussion in the Report makes it clear that its intended interpretation is as a deeming provision, see pp 39-51.

Crown is saying that he was induced to believe that it was a legitimate clinical or diagnostic procedure.

'Now, if you were to accept that that's the case, that is that [the complainant] submitted to this examination he having had misrepresented to him by the accused's actions the character of the act that was being undertaken, you would be entitled to find that there was a lack of consent. And if there was a lack of consent or an absence of consent, you would be entitled to find that there was an unlawful assault.

'And, similarly, if you were satisfied beyond reasonable doubt, of such misconceptions about the nature of the investigation or the nature of what was going on, you would be entitled, if satisfied of that beyond reasonable doubt, to conclude that that was a consent on [the complainant's] part procured by fraud. In other words, if the accused deliberately set out to cause [the complainant] to believe that this was a legitimate medical examination, whereas, in fact it was not, it was something he was about for his own sexual purposes and as a result of that, a result of inducing that state of belief in [the complainant's] mind [the complainant] submitted to what then happened, that would be consent induced by fraud and it would be a situation where you could find that because of the absence of consent – because, if you've got fraud you don't have consent – you could find that by reason of the absence of consent, it was an unlawful assault.

'Now they are the two ways in which I understand the Crown puts it to you. They might overlap to some extent, but the consent is the essential issue that the Crown's putting to you. They are saying, whether it was fraud or by reason of the circumstances that existed at the time, no matter what it was, [the complainant] obviously thought that this was a legitimate medical examination, whereas, in fact, it wasn't and as a consequence, the character of the act was so radically different from that to which he believed he was consenting that you should find there was an absence of consent in a legal sense and thus find the assault was unlawful'.

Later in the summation, His Honour stated,

'I told you that there were in fact two statutory situations where it was specifically provided that consent is not freely given and they are situations in which the consent or apparent consent has been procured by fraud, that is, by deceitful conduct intentionally embarked upon for the purpose of inducing a false appreciation of the facts in the mind of another person and which causes that other person, as a consequence, to act in a particular way'.¹⁵⁷

The relevant parts of this summation have been extracted at length because it represents a radically different approach to the question of fraud-induced consent to that adopted at common law and, in particular, because the trial judge did not follow the much criticised decision of the Victorian Court of Criminal Appeal in *Mobilio*. In the Tasmanian case, the trial judge clearly accepted that the purpose for which the accused's act was performed or the ulterior motive behind that act, could be determinative of its nature and character. At common law, the courts have tended to limit the meaning of the terms, 'nature' and 'character' of an act to its physical characteristics or components and excluded from these concepts such qualities as the purpose, reason or motivation for its performance. This narrow approach reached its high water mark in *Mobilio* where, as detailed earlier,¹⁵⁸ the Court did not accept that the understood or conveyed purpose of an act could affect its character in such a way as to determine the validity of any consent given to its performance. Clearly, therefore, the trial judge in the present case has adopted a much broader approach to the issues of fraud and mistake than has been accepted at common law. It means that if a complainant consents to an accused's act because he or she has been induced to believe that it has a non-sexual purpose, that consent will be vitiated by fraud or mistake if the act, in fact, has a sexual purpose. The character of the act to which he or she has consented will be treated as different

¹⁵⁷ Case number 35. His Honour then went on to consider the second statutory ground – whether the complainant had been overborne by the nature or position of the accused.

¹⁵⁸ See para 1.2.2.

to the character of the act that actually occurred. This will be so regardless of whether there was consent to the physical characteristics of the act actually performed. In such circumstances, there will be no freely given consent within the meaning of s2A.

This approach, if adopted by the majority of the Tasmanian Supreme Court judges, would obviate the need for the type of reform that has been adopted in a number of Australian jurisdictions to overcome the decision in *Mobilio*. These reforms have resulted in the inclusion among the statutory circumstances vitiating consent, the complainant's mistaken belief that the act is for medical or hygienic purposes.¹⁵⁹

However, a less satisfactory aspect of this summation is the reading that it gave to whether or not the complainant's consent had been vitiated by mistake. In fact, the trial just drew no meaningful distinction between consent given by reason of mistake and consent procured by fraud. He couched both concepts in terms of deliberate deception by the accused. While His Honour suggested that the concepts 'overlap to some extent', in truth, as he interpreted them, they were made to overlap completely. The result was that, in reality, the Crown case was left on one ground only – fraud.

It is submitted that if mistake is to operate as a separate ground vitiating consent, independently of fraud, there should be no requirement that the mistake be induced deliberately by the accused. At first sight, this would appear to offer an overly broad ground for negating consent. However, if mistake in this context is confined to mistakes as to the nature of the act or the identity of the sexual partner, as is the case under the proposed amendment contained in s2A(2)(f) of the Criminal Code Amendment Bill 1999 (Tas), then its operative scope is sensibly narrowed.

If mistake is couched in these narrow terms, this additionally justifies the broader interpretation of fraud. On this interpretation, for fraud to vitiate consent, the accused must deliberately mislead the complainant knowing that his dishonesty will induce the complainant to consent. The difference between the two situations may be illustrated by the example of an accused who climbs into bed with the complainant whilst she is asleep and commences to have sexual intercourse with her. Initially the complainant may permit him to continue because she thinks that he is her husband, boyfriend or partner. If subsequently she realises that this is not the case, mistake, but not fraud would operate to negate her consent because the accused did not deliberately mislead her as to his identity.

In the case under discussion, there was probably no real basis for mistake in the terms discussed here to operate. The accused was mistaken neither as to the identity of the accused, nor as to the nature of the act, at least not in the narrow sense of *Papadimitropoulos* and *Mobilio*.

4.5 Being Overborne By the Nature or Position of Another Person

The question of whether the complainant's will was overborne by the nature or position of the accused arose in only four trials in the present study where consent was in issue. Nevertheless, trial judges frequently commented upon the meaning of this provision when summing up to juries, usually to explain why it was not relevant to their determination of the case at hand. In two of the four cases where this matter was relevant to the juries' determination of the case, the critical factor involved in the overbearing of the complainants' will was the disparate ages of the complainants and the accused and, more particularly, the young ages of the complainants. In one of these cases, which involved three complainants,

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Crimes Act (Vic) s36(g); *Crimes Act* (NSW), s61R(2)(a1); *Criminal Law Consolidation Act* (SA), s73(5); *Criminal Code* (NT), s192(2)(f).

all were under ten years of age at the time of the offences. In the second case, the complainant was sexually assaulted by the accused over the course of several years, the first assault occurring when she was twelve years of age, the last when she was eighteen. The way that the trial judges dealt with the age differential in these cases is contained in Extracts 1 and 2 below.

In the third case where this matter arose, the factor relied upon by the Crown to suggest that the complainant's will had been overborne by the nature or position of the accused, was the doctor/patient relationship of the accused and the complainant. This case also raised the issue of whether the complainant's consent to sexual contact had been obtained by fraud or mistake. This aspect of the case is considered in para. 2.10.3 above. Extract 3 below contains the portion of the trial judge's summation that deals with the overbearing of the complainant's will by reason of the accused's position in relation to him.

In the fourth case, the Crown relied upon the employer/employee relationship between the complainant and the accused in combination with a significant age differential to establish that the complainant had been overborne by the nature or position of the accused. The complainant was 16 at the time of the offences and the accused was 40 years of age. Extract 4 below sets out the relevant portions of the trial judge's summation in this case.

Extract Number 1

'Consent may be freely given where it is not procured by force, fraud or threats of any kind or it is not procured by reason of the person being overborne by the nature or position of another person. Now that qualification (b) doesn't often arise in sexual cases that come before this court but it may be a concept that you need to give consideration to in the circumstances of this case. I say that because the complainants, that is the boys who have given evidence about these various sexual acts which they say occurred upon them, were obviously very young at the time that these events occurred. The accused was in a position where they regarded him, I think more than one said he was looked on as a trusted friend, and you might infer that from the evidence in any event, and that he was part of the family circle [Crown counsel] suggested you might conclude from the evidence generally. So, that could be a situation, particularly as he was an adult in relation to the three children, that could be a situation where any apparent consent by the children was the product of their being overborne by the nature or position of the accused. That would be a matter for you to consider. Position, of course, in that context does not refer to the physical position of someone. It refers to their position of authority or influence, in that sense. You might get a case of an employer and employee. You might have a mature adult employer who, by reason of the fact that he's attracted to a young girl in his employment, requires her to give some sexual advantage to him and uses his position. He threatens her perhaps with the sack if she doesn't submit. That would plainly be a situation in which any consent that she might give has been as a result of being overborne by the nature or position of the other person and, therefore, in the eyes of the law, that would not be a consent and it would not be a valid consent. It might be apparent consent to uncritical eyes but once the situation was analysed it would be seen that that was not a real consent at all'.¹⁶⁰

Extract Number 2

'It must not be procured by reason of the person being overborne by the nature or position of the accused. You may or may not think that this might arise here. That's a question of fact for you. But I will try and give you two or three examples that come into my mind. Firstly, for example, let's say a father has intercourse with his five-year-old daughter and she might feel overborne. She has to do everything that dad says. So, even if she let him do it, would it be a true consent? A jury, it seems to me in such a case, might say, "Oh no, that's not a true consent. She was overborne by the nature of the position of her father. She had to do what he said". The same with, perhaps, a school teacher with a little child. And you can, no doubt, think of other examples. Now here, the question of consent only really goes to rape and the

rapes didn't start, according to the girl, until she was about twelve. It's not suggested that they started when she was a tiny little girl. So, it may be, I don't know, it's entirely a matter for you, you may not think that this question of being overborne by the nature or position of the accused, her older brother-in-law, really arises, having regard to the fact that the girl was twelve. But, that's a matter for you'.¹⁶¹

Extract Number 3

'Consent where the person is overborne. Well, I'm not aware of any actual cases that have been decided under this provision of the law, but it's not difficult to envisage that you might have a new female employee. A young woman goes to work for a big company. The managing director comes along and insinuates or actually says, you know, "If you don't show me some sexual favours, you're going to get the sack". You might think that's a case where the person involved has been overborne and her submission to what then takes place is not a real consent.

....

'The Crown also puts it to you that [the complainant] was overborne by the nature and position of the accused. I have some difficulty with that. I have some difficulty because the word, "overborne" to me, or rather, the word, "overbear" to me means to exercise an oppressive influence over someone. To overcome their resistance by oppression or repression or by power or authority or emotional pressure you overcome their reluctance to do something. Now, I see nothing in the evidence which I would think would justify your concluding that he was overborne in that sense. So, it would seem to me that you look at this question of consent in terms of whether or not it was the character of the act which was, whether the character of the act which was consented to was the same as that which the accused represented by words or conduct to the complainant, was about to take place. And it seems to me that there lies the real test of consent in this case.

'If he's been overborne again, the law says consent that consent is not freely given. But, I told you why I had some difficulties, for my part, in seeing that there's been any overbearing conduct, as that phrase is understood by me, which could be said to have induced [the complainant] to allow this examination to take place'.¹⁶²

Extract Number 4

'...consent is not freely given where it is procured by reason of the person being overborne by the nature or position of another person. That is a comparatively recent requirement introduced into the criminal law and it is probably less than ten years that this was introduced into the concept of consent. And, it would seem to me to be a very important concept in the context of this trial and the evidence that you heard in this trial because [the complainant] disclaimed any violence being used to her but did describe to you the forces that she saw acting upon her which she claimed induced her to submit to intercourse with the accused. I will just read some of the evidence that she gave about that so that you can see the context within which your consideration of consent will obviously be required. [Crown counsel] asked her:

"During this night, on these occasions that he had sex with you, was he ever forceful in the sense of using violence against you?"

"He was not violent but very forceful and very arrogant in the way that he would not listen to what I was saying".

'She said she had a pain in the vagina but he had not hurt any other part of her body and when they went to work the following morning, she said that the accused was saying how amazing it was and how good I was and how he had had such a good sleep. She was then asked, "Did you at any time attempt to leave the house at T before you went to work with him the next morning?" She said, "No, I didn't". And she said the reason was "Because I actually had never been to T before. It was very late. I didn't know if I could ring my parents or not because, I mean, this man was going to be my boss and he had two children. I just didn't know what to do".

¹⁶¹

Case number 3.

¹⁶²

Case number 35.

'So the relationship with the prospective boss or boss could be very important in the context of this trial. She had just been engaged to do this part time work that afternoon and she had then gone baby-sitting. The man who took her baby-sitting was to be her boss. And you might think it's this sort of situation with which that recent amendment to the Criminal Code that I was mentioning a minute ago might well be primarily concerned. I remind you:

"Consent is not freely given where it is procured by reason of the person (that is the person said to have consented) being overborne by the nature or position of another person".

'In other words, in short, bosses are not entitled to take advantage of their position and the power that they have to hire and fire and make things unpleasant for an employee as a means of obtaining sexual favours. That is one gloss that can be put on it and it's plainly the gloss that the Crown has been asking be put on that in your consideration of the evidence in this case'.¹⁶³

Section 2A(2)(b) of the Code potentially provides a mechanism for extending the concept of non-consent beyond the traditional, established coercive circumstances of physical force and threats of physical harm. Potentially, it enables recognition of a range of non-consensual sexual impositions that would otherwise fall beyond the purview of the criminal law, including the sexual exploitation of vulnerable and dependent members of the community through the manipulation of economic or social power imbalances.

However, the cases from which the Extracts 1, 2 and 3 were taken as well as those in which trial judges commented upon the meaning of this provision without being required to apply it to the particular facts before them, appear not to have given to it any such extended scope. Instead they have adopted a cautious approach to its construction which, while perhaps not as restrictive as that taken in *Crisp*, the only appellate case that has considered this provision to date, nevertheless adheres to a conservative interpretation. In contrast, Extract 4 gives a much wider reading to the operation of s2A(2)(b) than that provided in *Crisp* and the other cases extracted here.

As noted earlier in this report,¹⁶⁴ in *Crisp*, 'being overborne by the nature or position of another person' was interpreted as requiring proof that the complainant did not have or was unable to exercise a rational choice, that she believed she was obliged to comply with the accused's demands and that she did not understand that she could choose to refuse. This construction effectively subsumed the operation of 'being overborne' in s2A(2)(b) into the rationality requirement for a valid consent in s2A(2)(1), and emptied it of any independent significance. A similar approach is evident in Extract 2 above. In his explanatory examples of sexual contact between a child and her father and between a school teacher and a little child, the trial judge depicted the overbearing of the children's will in terms of their very young age and their perceived obligation to obey. The children were represented as being overborne because they could not or did not understand that they had any other choice than to do as they were told. The power imbalance inherent in the father/child relationship was not presented as sufficient in itself to raise questions about the reality of any consent given by the child. It was coupled with the children's lack of understanding of the choices open to them.

A similar hesitation to accept that social and economic inequalities and dependencies can be inherently coercive is evident in the explanatory examples provided in Extracts 1 and 3, that of an employer and an employee. The trial judges coupled the pressure of the employer/employee relationship with another form of coercion, overt threats of loss of employment, to convey how a complainant's will might be overborne in this situation. Accordingly, this example also fails to recognise the possibility that complainants might be

¹⁶³ Case number 55.

¹⁶⁴ See para 1.2.4.

overborne to consent by innately coercive attributes of their relationship with the accused and independently of their own individual characteristics or of other coercive circumstances.

The interpretation in these cases also produces the problematic result that it may not give full effect to the precise terms of s2A(2)(b). The judges in these cases have not depicted the complainants' lack of valid consent as a product of their having been overborne by the *nature or position of the accused*. Instead, it has been ascribed either to qualities or characteristics inherent in the complainants, specifically to their lack of a mature understanding, or, to some supplementary, oppressive conduct on the part of the accused. As already noted, the first situation subsumes being overborne into the rationality requirement of s2A(2)(1). The second effectively equates it with submitting as a result of threats or force. The practical result of this construction can be seen in the judicial view in Extract 2 of a twelve-year-old child's ability to withstand adult sexual predation and in the view contained in Extract 3 of the nature of the pressure exerted by those in positions of trust such as doctors.

In Extract 2, the trial judge pointed to the fact that the complainant was not a 'tiny little girl', that she was 12 years old at the time of the offence, to query whether it really was a case where the complainant could be said to have been overborne by the nature or position of the accused. Clearly, it is not the nature or position of the accused which is important on this analysis, but the age of the complainant and her level of understanding. The issue as presented by the trial judge is, is the child old enough to understand that she can refuse. There is no analysis of whether the child's older brother-in-law, (in this case almost two decades older), exploited the age differential between them and his position as an older relation of the complainant to gain her submission to sexual contact. The focus is upon the complainant's capacity to withstand the accused's sexual advances and not upon whether the sexual use of a twelve-year-old girl by an adult male relative might constitute a sexually overbearing abuse of his position.

In Extract 3, the trial judge effectively ruled out the possibility that the position of trust or authority in that case, the doctor/patient relationship between the complainant and accused, might be sufficiently inherently coercive to overbear the complainant's will. His assessment of this issue was not undertaken by reference to the trust nature of that relationship or by reference to the power imbalance that inheres in it, but according to whether the accused had behaved oppressively or engaged in overbearing conduct. Again, it was not the nature or position of the accused that governed the determination of whether the complainant had been overborne. Rather, it was an extra, superimposed element that, in this case, was couched in terms of oppressive or repressive behaviour on the part of the accused, behaviour that subdued the reluctance or resistance of the complainant. This interpretation imports elements of force into the reading of s2A(2)(b) and aligns its construction with and potentially submerges its terms into those of s2A(2)(a).¹⁶⁵ It is an interpretation that is achieved and, indeed necessitated, by the trial judge's substitution of the word, 'overborne' in the provision by the word, 'overbear'. This substitution introduces a subtle, but very real, change into the meaning of the provision. It formulates the central issue in terms of whether the accused *acted* in such a way as to overbear the complainant. It focuses on the existence or non-existence of overbearing activity on the part of the accused and not upon the nature or position of the accused and the overbearing affect of either or both these factors upon the complainant.

In contrast, in Extract 4, the trial judge did not ground the operation of s2A(2)(b) in a combination of the accused's employer status and overt threats concerning the complainant's

¹⁶⁵ This provision nullifies consent that is procured by force.

employment. His Honour's analysis was concerned with the employer's tacit exploitation of inherently coercive features of the employer/employee relationship. In addition, unlike the Court of Appeal in *Crisp*, he did not depict the complainant's absence of consent in terms of a lack of real choice to refuse or a lack of appreciation that refusal was an option, but in terms of an implicitly applied and unacceptable pressure to submit derived from the nature of the accused's relationship to the complainant which robbed the consent obtained of the necessary quality of being freely given. Clearly this approach achieves a much wider interpretation and application for s2A(2)(b) than any other case considered here. However, an appeal has been lodged in this case which, at the time of writing, was yet to be heard. The width of interpretation given to s2A(2)(b) by the trial judge in this case may not survive the appeal and the narrower approach adopted in *Crisp* may be confirmed.

It is interesting to compare the statements in Extract 4 with those made in another case where the trial judge considered the meaning of s2A(2)(b) in summing up to the jury albeit the Crown had not relied upon this factor to establish non-consent. In this case the accused, who had been the 42 year old employer of the 18 year old complainant at the time the offences were alleged to have been committed, was charged with rape, attempted rape and aggravated sexual assault. The trial judge dealt with s2A(2)(b) as follows:

Extract Number 5

'Now the second bullet point there [in the judge's written memorandum to the jury] says, "It is not procured by reason of the person being overborne by the nature or position of another person". It is not a case of that. It's a very rare case when we get that in these courts. An example, I suppose, might be a very young child, wicked step-father, things like that. The child just does what it's made to do without resisting. It's overborne by the nature or position of the other person. Or a teacher with a very young child – can't say, "yes" or "no". Just does what teacher says. So although there might be, in a sense be consent, the law says it's not a true consent and it would be rape or whatever the crime charged is, no consent. Well, that's not raised in this case. I mean, even if [the complainant] allowed him to do it because it was the boss, and she didn't like to say, "no" to the boss, that wouldn't be a rape. If she agreed to him doing it. She didn't oppose him. She allowed him to do it because, well, that's the boss, well, that wouldn't be rape. There's no question of her being overborne by the nature or position of the accused, no question of that in this case'.¹⁶⁶

In this extract, the trial judge has taken a much narrower view of the scope of s2A(2)(b) than was taken by the judge in the case from which Extract Number 4 was taken. His Honour did not consider that the nature of the employer/employee relationship might contain inherently coercive features that could raise issues under s2A(2)(b). Instead he adopted an interpretation of this provision that conformed to that given in *Crisp*. He dealt with it as only applying in situations where the complainant could not understand that she had a right to refuse consent, where, in a sense, she was devoid of the capacity to refuse a person in the accused's particular position. Clearly, this approach allows no independent scope to s2A(2)(b) that is not already covered by the requirement in s2A(1) that consent must be given by a 'rational ... person so situated as to be able to form a rational opinion upon the matter to which consent is given'.

The narrow approach in *Crisp* reflects the views of those who argue that consent should only be treated as not freely given where the complainant is completely deprived of sexual choice.¹⁶⁷ According to this view, mere confinement or restriction of choice should not be accepted as sufficient to negate consent to sexual contact. The counter-arguments for the wider interpretation of s2A(2)(b) rest upon the meaning to be given to the term 'freely given'

¹⁶⁶ Case number 10.

¹⁶⁷ J Temkin, (1982) *supra* p 411.

in s2A(1). On this point it is suggested that consent cannot be said to be 'freely given' in a real sense where the freedom to consent is constrained or limited. To interpret constrained, confined or limited consent as being 'freely given' would mean that that term must encompass something less fully free agreement and must instead mean, 'substantially freely given'.

If the narrow approach to s2A(2)(b) is confirmed by the Court of Appeal, this would suggest that the hopes of those who envisaged this provision as enabling recognition of non-traditional constraints upon consent are unlikely to be fulfilled. It would also suggest that in practice, even though not in principle, s2A is generally likely to operate more as an exclusive than as an inclusive definition. The cases would, thereafter, be rare where circumstances other than those specified would be recognised as negating consent. This in turn suggests that it would be wise to expand the list of circumstances recognised as negating consent in s2A to provide as comprehensive a list of such circumstances as possible. The reform contained in the Criminal Code Amendment Bill 1999 (Tas), s4(a) provides an expanded list. However, it may also be wise to replace the vitiating circumstance in s2A(2)(b)¹⁶⁸ with one along the lines of s92P(h) of the *Crimes Act* 1900 (ACT). This section provides that a person does not freely agree if their agreement or submission is caused by the abuse by another person of his or her position of authority over or professional or other trust in relation to the person.

It is submitted that this provision is clearer and has a wider scope than s2A(2)(b). It is clearly not limited to situations where the complainant has no understanding of or ability to exercise his or her right to refuse consent. Further, its application is not dependent upon the complainant's will being overborne. It also potentially encompasses a number of social relationships that may not be entirely covered by the Tasmanian provision, for example, professional relationships like that of doctor and patient and teacher and student. It also covers relationships of trust and authority like parent/child relationships, employer/employee relationships and custodian relationships.

4.6 Being So Affected by Liquor or Drugs...as to be Incapable of Forming a Rational Opinion on the Matter to which Consent is Given

While over 60% of complainants in the trials in the present study were questioned about their drug or alcohol consumption,¹⁶⁹ the Crown relied upon drug or alcohol induced incapacity to consent to establish absence of consent in only two trials. In one, the incapacity arose from both drug and alcohol consumption and in the other, from alcohol consumption alone. In the former case the accused was convicted and in the latter the accused was acquitted. The point that was made by the trial judges in summing up in both these trials was that when the Crown case rests upon negating the complainant's consent by reason of intoxication, the determining question is, was the complainant *incapable* of making a rational choice one way or the other. This means that the question of whether the complainant actually consented does not arise if that question is answered in the negative. If the jury finds that the complainant was not capable of rational decision, then that disposes of the issue of consent. Extract Number 1 sets out the relevant portion of the trial judge's summation in the first case on this point.

¹⁶⁸ The equivalent provision under the Criminal Code Amendment Bill 1999 (Tas) is s2A(2)(d).
¹⁶⁹ See Table 11 above.

Extract Number 1

‘...if you say, “well, we are satisfied from all the evidence that she was incapable of giving a rational opinion on whether she should say, “yes” or “no” to sexual intercourse”, then you don’t have to consider whether she consented or not. It wouldn’t matter what she said or did up there. So far as that third element, without her consent is concerned, if she is so affected by liquor or drugs or so otherwise affected as to be incapable of giving her mind or bringing her mind to a state of rational opinion on whether she should say, “yes” or “no” to sexual intercourse, then that’s it. She couldn’t give a free consent, could she? And you wouldn’t have to go and worry about what she said or did when considering that third element of whether intercourse was with or without consent’.¹⁷⁰

In 16 other trials the trial judges commented upon the implications of the complainants’ alcohol consumption for the validity of their consent. This was most frequently done to explain the meaning of the term, ‘sober’ in s2A(1) which provides that to be lawful, consent must be given by a ‘sober person so situated as to be able to form a rational opinion upon the matter to which the consent is given’. In commenting on the meaning of this term trial judges made two things clear. First, they consistently stated that the requirement in s2A(1) that consent be given by a ‘sober’ person has no independent role as a ground for vitiating consent separate from that specified in s2A(2)(c) - alcohol or drug induced incapacity to consent. Second, they uniformly maintained that insobriety alone will not vitiate consent. To have this affect, both s2A(1) and s2A(2)(c) require that the insobriety be such as to render the complainant incapable of making a rational decision. The first point is illustrated by Extract 2 below, the second by Extracts 2, 3 and 4.

Extract Number 2

‘It’s got to be given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which consent is given. So the person has to be in control of his or her reason. Her faculties must be able to reason about the question of consent and that person must be sober. Now what’s included in that concept of sobriety seems to me to be amplified by sub-paragraph [(c)] where it deals with the question of whether consent is freely given and it says, “consent is freely given where it’s not given by a person so affected by liquor or drugs or so otherwise affected as to be incapable of forming a rational opinion upon the matter”. So, it seems that despite that rather bland proposition at the beginning of the definition that consent means consent freely given by a rational and sober person, when it’s speaking of a sober person, it’s really only saying that consent given by someone who’s incapable as a result of drink, is the only consent which is not freely given. In other words, simply because you have a couple of drinks and do things that you might not do if you had not had anything to drink doesn’t deprive your consent to activities when you’re in that state from being a proper consent, a lawful consent. So sobriety, as I read the provisions in the Code, only says, in effect, that if someone is so drunk as to be incapable of forming a rational opinion upon the matter in question, only then is any apparent consent from that person not a lawful consent, not consent in the eyes of the law’.¹⁷¹

Extract Number 3

‘Now clearly if a person was unconscious from a heart attack or so blind drunk that he or she doesn’t have any consciousness of his or her surroundings, a person who then had sexual intercourse with that person couldn’t be said to have her consent because you can’t consent to something you just can’t comprehend and that is obvious. ... It is not suggested that the complainant was not sufficiently sober to be capable of giving a free and rational consent. She had drunk some beer but there is no suggestion that it affected her to that stage. So, you can put that out of your mind. Bear in mind, of course, [defence counsel’s] comment that people who drink may be a little less inhibited and may do things when they’ve had a bit to drink that they

¹⁷⁰ Case number 18.
¹⁷¹ Case number 15.

mightn't otherwise do, but the evidence certainly doesn't suggest that this girl was so drunk that she didn't know what she was doing and couldn't give a rational consent'.¹⁷²

Extract Number 4

'Consent means consent freely given by a rational and sober person. Now, I've included that because you have evidence of intoxication – sorry, of the consumption of alcohol by [the complainant]. And, of course, the law requires that a person consents when they're rational and sober. For example, if we take a young girl who is unused to drink and she's plied with alcohol and she's really quite out of it and doesn't resist an act of sexual penetration and is all woozy and so on and you get the case – well she didn't fight, she didn't do anything, she was almost comatose. Well, that's rape. Why? Because she was not sober and was incapable of forming a rational opinion. That's the sort of area it's designed to meet. In this case that's not an issue for you. I've put it in because sobriety was raised. And [the complainant] says, "Look, I've been drinking. I was – had – I suppose, affected by alcohol if you want to say that – but I can tell you I knew what was happening. I knew that I was not consenting. There's no mistake about that. I wasn't one of those woozy people of whom advantage was being taken". So, really that's not in issue'.¹⁷³

There are, of course, practical difficulties confronting the Crown in establishing the degree of intoxication induced incapacity required by this interpretation of s2A(1) and s2A(2)(c). At this level of intoxication, the complainant is unlikely to retain an accurate memory of the event. Unless there are independent witnesses to the offence or the accused makes fortuitous admissions, the offence will probably remain unreported. If it is prosecuted, the credibility of any account given by the complainant will be readily open to challenge as being the product of drug or alcohol generated fantasy, a shamed conscience or drug or alcohol-fuddled recollection. This raises the question whether the level of intoxication required to vitiate consent should be set at a lesser level than the current law provides. The debate surrounding this question involves both practical and theoretical issues.

The opposing policy arguments concerning the degree of intoxication that should be required to negate consent essentially centre around the question of how far the reach of the criminal law should extend in this area. On the one hand there is the argument that the high level of intoxication currently required by the *Criminal Code* facilitates unconscionable conduct on the part of sexual predators who may exploit another person's inebriated state for sexual purposes knowing that, if sober, that person might not agree to sexual contact.¹⁷⁴ It is argued that, by countenancing an intoxicated consent as genuine consent, the law is really treating some women as fair game. Additionally, it is argued that true respect for an individual's sexual autonomy requires the law to treat as unlawful, consent induced by intoxication, where that consent would not otherwise have been given.¹⁷⁵ At the very least, it is suggested, the jurisdiction of the jury to determine the validity of intoxication produced consent should be couched in much wider terms than currently exist. The jury's determination should not be confined to situations where the consumption of drugs or alcohol has resulted in total irrationality, an inability to reason one way or the other about the matter. Instead the jury should be permitted much broader scope in any particular case to decide what affect intoxication had upon the existence of genuine agreement to sexual intercourse. This might be achieved by reforming s2A(2)(c) of the *Criminal Code* along the lines of s92P of the *Crimes Act 1900* (ACT) 1914 which simply provides that consent may be negated by the effect of intoxication.

¹⁷² Case number 9.

¹⁷³ Case number 6.

¹⁷⁴ V Waye, (1992) *supra* pp 94–105.

¹⁷⁵ T Henning, (1997) 'Consent in Sexual Offences Cases: the Continuing Construction', *Women Against Violence*, 3, November, pp 4–14.

The countervailing argument is that such a proposal would stretch the boundaries of unlawful sexual conduct too far, that the protection of sexual autonomy does not require that all forms of immoral sexual conduct be criminalised.¹⁷⁶ Proponents of this view argue that rape should be confined to situations where 'sexual choice is eliminated'.¹⁷⁷ Criminal liability should not, therefore, attach to situations where sexual partners are capable of making a decision, albeit that the decision reached results from inebriation. To require otherwise, it is suggested, would place too heavy a responsibility on individuals for the decisions of their sexual partners, and would, in any event, probably run counter to the reality of current ordinarily accepted sexual practices. In contrast, sexual contacts with complainants who have, as a result of intoxication, no comprehension of what is occurring, are not generally regarded as socially acceptable, because in such situations, there can be no decision to consent, of any nature, drunken or otherwise.

At a practical level, it is difficult to envisage how intoxication short of incapacitation would operate to negate consent. For example, would it be sufficient to establish that the complainant only consented because she was inebriated and that she would otherwise not have consented, or would it additionally be necessary to establish that the accused was aware that this was the nature of her consent? In any event, the accused would necessarily be able to rely upon the defence of honest and reasonable but mistaken belief that the complainant's consent was wholehearted. Further, where the affect of the complainant's consumption of alcohol produced something less than an incapacity to consent, proof of the factual absence of consent would be problematic. For example, in the present study it was found that complainants generally testified, when questioned about their alcohol consumption at the time of the offence, that it had not affected their recollection of events nor their ability or willingness to refuse consent.

4.7 Interpretation of Mistaken Belief in Consent

As indicated above, this study was concerned to learn how the defence of mistaken belief in consent was interpreted by trial judges in summing up to juries. The investigation of this matter involved examining, first, its general interpretation and, second, the facts said to comprise its possible evidentiary foundation in the cases tried within the period of the study. This enabled an understanding to be gained of how trial judges dealt with the defence and what evidence or facts were viewed judicially as capable of giving rise to a jury finding that the accused was honestly and reasonably mistaken about the existence of the complainant's consent.

As a preliminary matter, however, the study considered how trial judges approached the defence of mistake in those cases where they left it to the jury solely of their own motion. As has already been observed,¹⁷⁸ in eight of the 20 cases where trial judges left the defence of mistaken belief in consent to the jury, they did so of their own motion. The accused had not specifically relied upon this defence as part of their case. In the remaining 12 cases where this defence was left to the jury, it had expressly been relied upon by the accused. Specifically, the researchers were interested to discover whether the trial judges regarded this defence as being generally applicable and a matter that the Crown is generally required to disprove in sexual offences cases or, alternatively, whether it was seen to arise by virtue of particular facts evidenced in the trials.

¹⁷⁶ S Bronitt, (1992) *supra* pp 289–310; J Temkin, (1982) *supra* pp 399 – 411.

¹⁷⁷ J Temkin, (1982) *ibid.*, at p 411.

¹⁷⁸ See paras. 2.5 and 2.6.2 above.

4.7.1 Application of the Defence of Mistake

It was found that in six of the eight cases where the trial judges left the defence of honest but reasonable mistaken belief in consent to the jury of their own motion, they did so on the basis that this defence is generally applicable in sexual offences trials and an issue that the Crown bears the onus of disproving. In none of these six cases did the trial judges refer to specific items of evidence adduced at trial as providing an evidentiary foundation for the defence, though they did remind the jury to take into account all the evidence in the case when considering this issue. For example, in one case the trial judge stated:

'Now the next matter I must tell you is this, that even if you are satisfied beyond reasonable doubt that the accused did have sexual intercourse with the complainant without her consent in fact, nevertheless, it is a defence to such a charge that the accused honestly and reasonably although mistakenly believed that she was, in fact, consenting. If the situation is that the accused believed that the complainant was consenting to intercourse and that belief was honestly held by him and on the totality of the facts you find proved, was reasonably held by him, then your duty would be to return a verdict of not guilty. Such a belief, that is to say, an honest and reasonable belief that the girl was consenting, doesn't have to be induced by the complainant herself, by her conduct. In considering whether or not the belief was held honestly and reasonably you must have regard to the whole of the evidence, not only hers but his and all the circumstances as you know them to be'.¹⁷⁹

In three cases the trial judges incorporated the defence into the definition of rape or explained that it was required to be left to the jury as a matter of law. For example, in one case the trial judge said:

'Even if the woman is not consenting to the sexual intercourse, a person is not guilty of the crime of rape if he honestly and reasonably believes that the woman is consenting to it. Now that doesn't really seem to have been raised in this case, but I'll just mention it to you. It just might be that an accused person believes that the woman is consenting. He has reason to believe that she is, whereas in truth she is not. The law as to that is that if the accused honestly believes the woman is consenting and if the jury thinks that it was reasonable of him in those circumstances to believe that, to have that belief, then that would be a defence to rape or to a crime committed without consent. But that doesn't really seem to be raised in this case. I should add that if you were considering it, you nevertheless, have to be satisfied that the Crown has proved all these elements beyond reasonable doubt, and if you are left with a reasonable doubt as to whether the accused honestly and mistakenly believed that she was consenting, then he'd be entitled to the benefit of that reasonable doubt and to a verdict of not guilty. He doesn't have to prove that he honestly and reasonably believed that she was consenting. And then, finally, I summarised rape in that memorandum by saying, therefore, before the accused can be found guilty of any of the counts of rape, and I think that's any of the counts, no, any of the counts of rape only, that's right, the jury must be satisfied beyond reasonable doubt that he had sexual intercourse with [the complainant] on the particular occasion alleged by her, that it was without her consent and, at that time, the accused did not honestly and reasonably believe that she was consenting to it. They're the elements of the crime of rape'.¹⁸⁰

In one case the trial judge explained that he generally left this defence to the jury in rape cases and that it is, in any event, a defence of general application not confined to sexual offences cases. His Honour described the defence as comprehending a 'middle course' view of the evidence. Having described the essence of the Crown and the defence cases His Honour stated:

'However, I don't know what view you will take of the evidence. You may take a middle course about it. I don't know. So, in order to cover every eventuality I give you a direction there as element four, that a person is not guilty of rape if he honestly but mistakenly believes on grounds that you, the jury think reasonable that there was consent. Now there's nothing

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Case number 48.

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Case number 10.

special about rape cases with respect to that proposition. It applies right across the criminal jurisprudential field. If a person honestly but mistakenly believes in a fact, on grounds that the jury think reasonable, which if true, would make their conduct not criminal, then they're not guilty and no eyebrow should be raised about it applying in a rape case. ... If you think it's reasonably possible that the accused honestly but mistakenly believed that she was consenting and you, the jury assess the grounds on which he held that belief to be reasonable, then he would not be guilty of intercourse without consent. Now he didn't claim that. She didn't give any grounds for suggesting that, but I give you that direction. You may think, "Oh, well, that doesn't arise in this case on our view of the facts", but I don't know what view you will take of the facts, so I give you that direction, as I do in, I think almost every rape case, this honest and mistaken belief'.¹⁸¹

In the two remaining cases where the trial judges left the defence of mistaken belief in consent to the jury on their own motion, they identified particular evidence that was capable of raising mistaken belief in consent as an issue for determination. In one case the evidence was contained in the video recording of the police interview with the accused and consisted of statements he had made to the police suggesting that he might have mistakenly believed that the complainant was consenting. In the other case, the evidence comprised the accused's account of the events in question to which he testified at trial. In the former case, the trial judge referred to the relevant evidence as follows:

'So there's no room on her version or his version for there to be a mistaken, an honest and reasonable mistaken belief. Why it's there [in the jury memorandum] is because if you reject his version given here and if you rejected part of her version and you find that there was sexual intercourse and that she didn't consent, you might find some evidence in the video that he might have claimed there that he had a mistaken belief'.¹⁸²

In the latter case, the evidentiary foundation for the defence was dealt with in the following way:

'You've got to look at the facts and determine whether or not, even if he had an honest belief, was it reasonable in the circumstances that he should have held that belief and if you conclude it is reasonably possible he had an honest and reasonable belief that [the complainant] was consenting thereto, well, he's entitled to an acquittal. Now obviously that issue arises in the circumstances of this trial because of the evidence the accused himself gave as to what he says occurred in the paddock'.¹⁸³

Possibly the most interesting aspect of these cases is that, in the majority of them, the trial judges left the question of mistaken belief in consent to the jury without indicating what specific items of evidence adduced in the trials might be considered to be relevant to its determination. The jury was simply referred to the totality of the evidence in the case.

The question begged by this approach is whether it constitutes an adequate discharge of the trial judge's settled duty with respect to summing up the law and the relevant facts of the case for the jury. In *Lawrence*,¹⁸⁴ Lord Hailsham, then Lord Chancellor, set down the components of this duty as follows:

'A direction to a jury should be custom built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of the jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts'.

¹⁸¹ Case number 26.

¹⁸² Case number 15.

¹⁸³ Case number 7.

¹⁸⁴ (1981) Cr. App. R. 1 at 5.

Statements to like effect were made by the Australian High Court in *Alford v Magee*¹⁸⁵ where it was said:

'... it may be recalled that the late Sir Leo Cussen insisted always most strongly that it was of little use to explain the law to the jury in general terms and then leave it to them to apply the law to the case before them. He held that the law should be given to the jury not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case. ... that the judge was charged with, and bound to accept, the responsibility (1) of deciding what are the real issues in the particular case, and (2) of telling the jury, in the light of the law, what those issues are'.¹⁸⁶

Essentially, the trial judges, in the cases under discussion here have explained the law to the jury in general terms without reference to specifically relevant items of evidence adduced in the trials. Then they have recounted the Crown and the defence versions of events, again without relating particular factors in those accounts to the legal issues to be determined. The particular aspect of this style of summing up which arguably does not accord with the settled law as described in *Lawrence* and *Alford v Magee* is that it does not indicate to any extent what are 'the inferences which the jury are entitled to draw from their particular conclusions about the primary facts'.¹⁸⁷ These summations appear to have given the law to the jury 'merely with reference to the facts of the particular case' and without 'an explanation of how it applied to the facts of the particular case'.¹⁸⁸

The main deficiency with this mode of summing up is that identified by the High Court in *Alford v Magee* – it is of 'little use'.¹⁸⁹ It does not sufficiently elucidate the legal or factual the issues being tried. It may leave the jury more confused than enlightened about the law and its application to the particular facts of the case. It is submitted that there is a genuinely live possibility that this was a problem in cases examined in this study given the finding that there was a higher percentage of indeterminate verdicts, that is, hung verdicts, in cases where mistaken belief in consent was left to the jury than in those where it was not.¹⁹⁰

Another equally important question raised by these cases is whether the trial judges were justified in leaving the defence of mistaken belief in consent to the jury or whether they should, more appropriately have withdrawn or withheld it as an issue. This defence should not be left to the jury unless there is evidence capable of raising a reasonable doubt as to its existence. The preliminary determination of this matter by the trial judge has been expressed in a number of Canadian cases as requiring the trial judge to 'determine whether any evidence exists to lend an air of reality to the defence'.¹⁹¹ In those cases where the trial judges simply referred the jury to the entirety of the evidence in determining the application of the defence it is not clear that this task was performed.

This concern is reinforced by the occasional judicial practice observed here of incorporating the defence of mistaken belief in consent into the definition of the offence without reference to any precise evidentiary foundation giving rise to it and also by statements, such as that extracted above, to the effect that this defence is generally left in rape cases, again without reference being made to specific evidence supporting it in the instant case. In two Tasmanian

¹⁸⁵ (1952) 85 C.L.R. 437 at 366.

¹⁸⁶ See also *Tegg* (1982) 7 A. Crim. R. 188 at 200 (Tasmanian Court of Criminal Appeal); *Jellard* [1970] VR 802 at 804 (Supreme Court of Victoria); *Schmahl* [1965] V.R. 745 at 747 (Supreme Court of Victoria).

¹⁸⁷ *Lawrence*, (1981) Cr. App. R. 1.

¹⁸⁸ *Alford v Magee* (1952) 85 C.L.R. 437.

¹⁸⁹ *Ibid.*

¹⁹⁰ See para 2.6.2 above.

¹⁹¹ *R v Esau* [1997] 2 S.C.R. 120; *R v Osolin* [1993] 4 S.C.R. 595; *R v Ewanchuk* (1999) 131 C.C.C. (3d) 481.

Court of Criminal Appeal decisions, *Ingram*¹⁹² and *Dalwood*,¹⁹³ it was made clear that the defence of mistake should be left to the jury wherever there is evidence capable of supporting it. However, it was made equally clear that there must be a sufficient evidentiary foundation for the defence to justify this being done. In *Ingram*,¹⁹⁴ Burbury CJ said:

'Since the absence of awareness that the woman was not consenting does not have to be negatived under the Tasmanian law as to rape, a direction that the accused should be acquitted if the jury is satisfied that the accused penetrated the woman under an honest and reasonable but mistaken belief that she was consenting, may be more often called for than in the common law States. But there must of course, be a reasonable foundation in the evidence to call for that direction'.

In the same case Chambers J expressed this matter as follows:

'There is no doubt, of course, that a proper evidentiary basis must exist before a jury is required to be directed on the defence of mistake...

'I am not intending by what I have said to suggest that in all or most cases of rape where consent is the real issue, that the trial judge is under an obligation to put a defence of mistake to the jury. There is obviously no such obligation where, on a view of the evidence most favourable to the accused, a reasonable jury could not be satisfied that the defence had been made out. Furthermore, he might be under so such obligation in a case where, the matter having been specifically raised, counsel for the accused has said that he does not desire any such direction. Each case must depend upon its own facts and circumstances.

'There may be no room for the operation of s14 of the Code where the story of the woman and the accused are in stark violent contrast, for example, she alleging acts of great physical violence and threats of more physical violence and he alleging an act of intercourse by mutual consent. The position may well be otherwise where the woman has shown little or no outward manifestation of any lack of consent'.¹⁹⁵

In four of the cases where the trial judges left the defence of mistake to the jury of their own motion, the points made by Chambers J in *Ingram* appear to have been overlooked. The accounts of the accused and the complainants were in 'stark' and 'violent contrast', the accused alleging mutual consent, the complainants asserting profound levels of violence.

4.8 General Directions Concerning Mistaken Belief in Consent

With regard to the general directions given in relation to mistaken belief in consent, trial judges' summations usually followed a standard pattern. First, the elements of the defence were set out and defined and then an explanation was given as to who bore the onus of proof in relation to it. Subsequently, trial judges might augment that direction by referring to illustrative examples or by indicating when a mistaken belief would not qualify as honest or reasonable. For example, the trial judge might point out that a fanciful belief would not qualify as a reasonable belief or he might explain how evidence of an accused's intoxication is to be dealt with in relation to the defence. In addition, trial judges might comment on the role of the complainant in relation to the defence, stating that the availability of the defence is not dependent upon the mistaken belief being induced by the complainant. Extracts numbered 1 to 8 below provide examples of such summations.

¹⁹² [1972] Tas S.R. 250.

¹⁹³ Unreported Court of Criminal Appeal Decision, Serial No 99/1967. While both *Ingram* and *Dalwood* are now wrong on the onus or proof in relation to the defence of mistake, (see *He Kaw Teh* (1985) 157 C.L.R. 523 and *Brown* Unreported Court of Criminal Appeal decision, Serial No 7/1990), they are otherwise sound on the operation of this defence in relation to sexual assault cases.

¹⁹⁴ [1972] Tas S.R. 250 at 251

¹⁹⁵ Ibid at 263 and 266-7. See also *Dalwood* Unreported Court of Criminal Appeal Decision, Serial No 99/1967.

4.8.1 General Definition of Mistake

Examples of how trial judges typically directed juries on the general meaning of mistaken belief in consent are set out in Extracts numbered 1 and 2 below:

Extract Number 1

'If the prosecution proves the necessary elements of the crime of rape beyond reasonable doubt, the accused ... is nonetheless, entitled to an acquittal of that crime if upon the whole of the admissible evidence, that is, the evidence admissible in respect of his criminal liability in this trial, you believe it to be reasonably possible that he committed the relevant offence under the honest and reasonable, even if mistaken belief the [the complainant] was consenting thereto. The key words in that proposition are "honest" and "reasonable". So that you need to consider in considering whether or not he may escape liability, notwithstanding the proof of the ingredients of the offence, whether it's reasonably possible that at the time he had the honest, that is genuine belief and reasonable belief. And what's reasonable, of course, is a matter for you as the jury. You've got to look at the facts and determine whether or not, even if he had an honest belief, was it reasonable in the circumstances that he should have held that belief and if you conclude it is reasonably possible he had an honest and reasonable belief that [the complainant] was consenting thereto, well, he's entitled to an acquittal'.¹⁹⁶

Extract Number 2

'So, if you thought it might reasonably be the case that he did honestly believe she was consenting, even though, in fact, you are satisfied that she wasn't consenting, and he had reasonable grounds for his belief, then you cannot convict him of that count of rape. The reason for this is that the law says that if a person honestly and reasonably even though mistakenly believes in a state of facts which if true would make his or her act not an unlawful one, then he or she should not be convicted of a crime. If you were satisfied that the accused did have intercourse with the girl without her consent, on either occasion, and as I say there seems to be no issue there were two separate acts of intercourse – penetration of the vagina- you would still then have to ask yourselves the question, are we satisfied beyond reasonable doubt that he didn't honestly and reasonably believe that she was consenting. If he was honestly and reasonably mistaken about the fact of her consent, or if you thought it might reasonably be the case that he was, you should acquit him. But there must be a reasonable possibility, not just a case of mistaken belief, but it's got to be a mistaken belief that is based on reasonable grounds and honestly held. It has got to be more than a case of you just not knowing one way or the other and going ahead on the off chance that she was consenting. He must genuinely believe that she was and furthermore, it must be on reasonable grounds. There must be a reasonable basis for the belief having regard to the whole of the evidence. So it has got to be a reasonable belief in all the circumstances as you find them'.

General directions of the kind contained in Extracts numbered 1 and 2 above might be further explained by reference to examples taken from other fact scenarios including scenarios not involving sexual offences. However, in the following extract, the requirements of the defence of mistake are illustrated by reference to a sexual assault example:

Extract Number 3

'...secondly, you would judge, not him, how an ordinary person, in the same position would reasonably believe that the complainant was consenting to the act or acts of sexual intercourse. So that – you test that by your knowledge of life, your perception, your common sense and your understanding. But would an ordinary person, receiving those signals or, as I've found them – would they believe that the complainant was consenting? I'll give you an example. It's hard to find an example and I won't give you an example from this trial. I'll give you a simpler one. And I'm not suggesting that it applies to this complainant or to this accused. Please, don't think that I'm doing that. But we'll take a male and we'll call him an "ocker" and we'll give him a particular up-bringing and he's generally of the view that all women say, "No" and that after he's touched the magic button they melt in his arms, and it's just a matter of persistence. And

we'll give him the benefit of honesty. That's how he's been raised. So, he comes and says, "I honestly believed that she was consenting, and they all do in the end, don't they?" said he. Now you might find that that was an honest belief. Stupid, but honest. But then you apply the second test. What would an ordinary person, in that room, in that situation – would they reasonably believe that the complainant was consenting? She said, "No". She said, "Get out of it".¹⁹⁷

4.8.2 Qualification as Honest and Reasonable

Three general themes emerged with consistent regularity in trial judges' summations concerning when a mistaken belief would or would not qualify as an honest and reasonable belief. The first was that a fanciful belief is not a reasonable belief, the second, that the mistaken belief in consent does not have to be induced by the complainant and the third was that evidence of intoxication must be ruled out of account when determining whether the belief was reasonable.

A fanciful belief is not an honest and reasonable belief

Extracts Number 4 –6 below illustrate what was typically said in relation to this point:

Extract Number 4

'If you are left with a reasonable doubt as to whether he had an honest and reasonable belief as to her consent then you should find him not guilty. Now such a belief must be honestly held by him of course. It mustn't be a fanciful hope that she might be agreeing or something like that. He must have honestly believed she was consenting. And it must have been a reasonable belief, that is, reasonable in your minds. Having regard to the circumstances as he believed them to be was it reasonable for him to hold that belief?'¹⁹⁸

Extract Number 5

'I want to stress, it is not enough just to – if you think it's reasonably possible that he honestly but mistakenly believed in something, that belief has to be based on reasonable grounds, otherwise the law would be in chaos wouldn't it? People would be going around just shutting their eyes to things and saying, "I honestly believed that". It is for you, ladies and gentlemen to say that if you think it's a reasonable possibility that he did have that honest belief, was it on reasonable grounds'.¹⁹⁹

Extract Number 6

'It does sometimes happen that the woman is not consenting but the man believes that she is. Now, the law on that is this: that if he honestly believes it, that is, it's got to be a genuine and honest belief, and not just fanciful hoping or anything like that, but he honestly believes that she's consenting then that can justify what he's doing provided that the jury thinks and determines that it was reasonable of him to hold that belief'.²⁰⁰

The mistaken belief does not have to be induced by the complainant

Trial judges also directed juries that the accused's mistaken belief in consent did not have to be induced by the complainant:

Extract Number 7

'... even if you are satisfied beyond reasonable doubt that the accused did have sexual intercourse with the complainant without her consent in fact, nevertheless, it is a defence to such a charge that the accused honestly and reasonably although mistakenly believed that the complainant was consenting to intercourse and that belief was honestly held by him and, on the totality of the facts you find proved, was reasonably held by him then your duty would be to

¹⁹⁷ Case number 25.

¹⁹⁸ Case number 31.

¹⁹⁹ Case number 28.

²⁰⁰ Case number 3.

return a verdict of not guilty. Such a belief, that is to say, an honest and reasonable belief that the girl was consenting doesn't have to be induced by the complainant herself, by her conduct. In considering whether or not the belief was held honestly and reasonably you must have regard to the whole of the evidence, not only hers but his and all the circumstances as you know them to be'.²⁰¹

Extract Number 8

'If on your consideration of all of the evidence against [the accused] you consider that he may have had an honest and reasonable belief, even though a mistaken one, that [the complainant] was consenting to intercourse, then you must consider acquitting him and you certainly must acquit him if you have a reasonable doubt about the matter. Such a mistaken belief does not have to be induced by [the complainant]'.²⁰²

Relevance of evidence that the accused was intoxicated

In cases where there was evidence that the accused had consumed alcohol or taken drugs, trial judges explained how juries should use this evidence when considering the honesty and reasonableness of the accused's possibly mistaken belief in consent. In this regard, trial judges generally explained that the accused's intoxication was relevant to the consideration of whether the accused's belief in consent was honest but irrelevant to the determination of its reasonableness. The following Extract illustrates these matters:

Extract Number 9

'You judge whether it [the accused's mistaken belief] was reasonable according to your standards, collective standards on the jury. When judging whether he might have believed that, no doubt, you would have regard to his state of sobriety or otherwise and you'll consider whether it is possible that he could have honestly believed that she was consenting. But when you come to judge whether any such belief would have been a reasonably held one, he can't have the benefit of intoxication then. You would have to assess the reasonableness of such a belief from a sober viewpoint not from an intoxicated viewpoint'.²⁰³

4.9 Evidence Relevant to Consent and Mistaken Belief in Consent

The main categories of evidence identified as potentially relevant to the issues of consent and mistaken belief in consent were evidence of passivity or lack of resistance on the part of complainants, evidence of verbal and non-verbal communication relating to consent, evidence that the accused had made admissions to the police and evidence of force and that the accused had behaved violently towards complainants. In addition to these categories of evidence, in the final part of this section, judicial consideration of the absence of physical injury and damage to clothing is discussed. The question explored in relation to this matter is whether evidence of physical injury or damage to clothing was treated by trial judges as a reasonably expected concomitant of genuine non-consent.

4.9.1 Passivity or Lack of Resistance

As already noted (see para. 2.6.8), because of the prosecution burden of proof in relation to the issues of consent and mistaken belief in consent, evidence that the complainant resisted the accused will generally comprise an important component of the Crown case. The corollary of this is that, the defence will often attempt to portray the complainant as not resisting and, consequently, as evidencing consent or inadequately communicating lack of agreement. A passive or silent response on the part of the complainant is, therefore, apt to be interpreted by the defence as a manifestation of consent or as grounds for a mistaken belief in

²⁰¹ Case number 48.

²⁰² Case number 23.

²⁰³ Case number 23.

consent. The present study was interested to learn how trial judges dealt with this matter in summing up to juries. The analysis focussed specifically upon whether passivity was treated as providing a foundation for the defences of consent and mistaken belief in consent or whether trial judges ever adopted the opposite approach and suggested to juries that consent should not necessarily be inferred from lack of resistance or silence.

The study found that in 45% of cases (20) where the defence of consent was available to the accused, the trial judges considered evidence of the complainants' alleged lack of resistance in their summations. In two of these cases lack of resistance was specifically interpreted as consistent with a finding that the complainants had consented. In one other case, the complainant's lack of resistance and silence constituted the principal basis of the trial judge's decision to withdraw a charge of attempted rape from the jury. In contrast, in the two cases where the Crown alleged that the complainants were incapable of giving a valid consent by reason of intoxication, evidence of the complainants' passivity was discussed as supportive of that case. However, in no case was it explicitly suggested that the jury should *not* necessarily find that the complainant had consented just because she did not resist or failed to indicate her lack of consent. More usually trial judges left the interpretation of complainants' lack of physical or verbal resistance to the jury without suggesting any specific construction that might be put on it.

Passivity as evidence of consent

Extracts numbered 1 and 2 below set out the relevant portions of the two summations where the trial judges treated complainants' lack of response as providing possible evidence of consent. It is important to note, however, that in Extract Number 1, the trial judge was also careful to explain that there is no requirement in law that the complainant resist and that there may be good reasons, consistent with an absence of consent, why a complainant might not resist.

Extract Number 1

'It is not necessary for the Crown, as a matter of law, to prove that the complainant suffered physical injuries, transient or permanent, nor that she screamed or called out for help or physically protested or resisted. In some circumstances, you might think, that the absence of injuries or cries for help suggests that the complainant was in fact consenting. That is a matter of fact for you to consider, having regard to the whole of the evidence. As a matter of law, however, there is no requirement for there to be resistance of that kind, or indeed of any kind. You may think that in some circumstances that you would expect the girl to scream or struggle so violently as to produce observable injuries and that may create a doubt in your mind, which you consider to be a reasonable doubt. It is a matter for you. On the other hand individual personalities and reactions to unwanted incidents do vary and you may consider that her failure to cry out and struggle more violently than she did, or to say more than she did, is understandable in the circumstances. And you may be satisfied beyond reasonable doubt that she did not consent. Again, it is entirely a matter for your judgment, not mine. You may think, for example, that if before intercourse had taken place, the accused had lowered her jeans and his own thereby signalling his intention or desire to have sexual intercourse with her and at that time other people came into the car park, that the complainant would have been extremely embarrassed to call out for help, that she was in a dilemma what she should do. If she called out, these people would see her literally caught with her pants down, and in circumstances where all the appearances were of her being and doing what was happening consensually. On the other hand, if she didn't call out, there remained the hope or belief that she could physically resist him or talk him out of any further sexual activity. She says that she felt she could handle the situation and so she chose not to call out. [Crown counsel] puts it to you that this was an

understandable reaction on the part of an immature sixteen year old caught in those sort of circumstances. It is a matter entirely for you'.²⁰⁴

Extract Number 2

'And then [the accused] said, "Oh what, it's my turn now?" or "my go now is it?" and she didn't say he couldn't, didn't say, "fuck off", or anything like that. He undid his trousers. She just didn't respond. It just happened. She wasn't wearing any clothing. She did nothing at all to indicate that he should go away. He agreed though, she didn't kiss him or caress him that he was aware of, although he did have his tank top on. So, he said, "I got down between her legs, undone me trousers, took me trousers down, laid down on top of her, kissed her on the tits, kissed her on the neck, you know – normal stuff and that, and, you know, trying to penetrate, rubbing in between her legs. Just kissed her on the nipples and the neck and that". He said she put her hand on his penis and rubbed it up and down her vagina. He was trying to penetrate her. ... She did nothing at all to indicate that she was not consenting to him although she didn't say yes or no. She did not struggle. ... So, his evidence tells you that there was absolutely no rape, although the girl mightn't have been showing excitement, she did participate to some extent by taking hold of his penis and rubbing it in the way described in his evidence and she certainly did not indicate absence of consent. So, on his version of events, quite plainly there was no rape'.²⁰⁵

It is interesting to consider how the summation in Extract Number 2 would have differed had the reform contained in s4(g) of the Criminal Code Amendment Bill 1999 (Tas.) then had the force of law. This reform mandates the trial judge to direct the jury that the complainant is not to be regarded as having consented just because he or she did not do anything to indicate his or her lack of consent, and further, that the fact that the complainant did not do or say anything to indicate that he or she was consenting is normally enough to indicate absence of consent. In the case from which Extract Number 2 was taken this reform would have required the trial judge to inform the jury that even if they did accept the accused's version that the complainant did not respond or resist or indicate lack of consent they should not for that reason alone regard her as having consented. This would have enabled quite a different spin to be put on the accused's version of the event to that he was proposing.

Implications of complainant's passivity for *mens rea* of attempted rape

Extract Number 3 contains the trial judge's decision to withdraw a charge of attempted rape from the jury on the basis of the complainant's lack of resistance and silence.

Extract Number 3

'...I have to consider whether the Crown has put up sufficient evidence upon which a jury could find that the accused's state of mind was that he was intending to commit the crime of rape and he was not to know what she actually had in her mind. He had only to go on what she did or how she conducted herself and on what she said. So, her evidence for the purpose of this submission needs to be looked at upon that basis, what she did do, what she did say. I suppose, equally, what she didn't do and what she didn't say. Now, I don't think it's exaggerating to say that, put at its highest, what she did was just lie there and allow what occurred to occur and allow it in the sense of not doing anything or saying anything to stop it, with two exceptions. One was when the accused was kissing her on part of her body. She wanted him to stop and she moved, I think it was rolled over, and she did try to stop him. And he stopped. He didn't try to persist. Didn't try to roll her back or anything like that. He didn't persist. And the other part of her evidence concerning actual steps she took to stop him was right at the end when he was trying to have intercourse with her and it was hurting her a great deal and she kicked him backwards and the evidence is that he stopped. He didn't try anything else at all after that. There is no evidence at all indicating that while he was trying to have intercourse with her, she said or did anything other than kicking to stop him, to indicate that she didn't want him to do what he was obviously intending to do. [Crown counsel's] submission was that, nevertheless, it

²⁰⁴ Case number 9.
²⁰⁵ Case number 23.

would still be open to the jury to be satisfied beyond reasonable doubt that by her inaction and inertia generally, he knew or he must have known or adverted to the possibility that what he was doing was without her consent. Now, I accept that that's a possibility. That may possibly be so, but I cannot accept that a jury could reasonably conclude beyond reasonable doubt of that. [sic] So, the only direct evidence of the accused's state of mind comes from what he told the police in his interview and that clearly supports acquittal. The only other evidence is circumstantial evidence, the circumstance being [the complainant] remaining inert and just letting things happen and I use that, not in any sense that consciously she was consenting but just lay there'.²⁰⁶

This extract illustrates a number of interesting points. First, it shows that the trial judge assessed the accused's state of mind entirely according to the complainant's conduct, what she did or did not do to make known her state of mind. There was no analysis of this issue from the point of view of the accused's conduct, from, for example, attempts he may or may not have made to ascertain her attitude to sexual contact before pressing his sexual advances upon her. In fact, the evidence showed that he made no such attempts because those sexual advances commenced while the complainant was asleep. She awoke to find the accused rubbing her thigh and stomach.

Second, there are anomalies in the trial judge's reading of the accused's and the complainant's behaviour. With two exceptions he characterised the complainant's conduct as inert and essentially non-communicative. The first exception occurred at the beginning of the episode when the complainant rolled onto her stomach to prevent the accused from kissing her. His Honour clearly interpreted this action as evincing a desire that the accused desist, a desire that was conveyed to the accused, because according to the judge's view of the facts, the accused did then desist from kissing the complainant. He clearly did not desist, however, from other sexual behaviour. He inserted his finger into the complainant's vagina and then attempted, several times, to insert his penis into her vagina until she finally kicked him away.

His Honour's interpretation of these facts allowed the accused to have it both ways. On the one hand, His Honour found that the accused desisted because of the complainant's conduct. On the other, he found that the accused's subsequent persistence could reasonably be viewed as following from the complainant's lack of response. Importantly, His Honour did not ask the illuminating question, 'what did the accused do after the complainant rolled onto her stomach to clarify whether further sexual contact would be welcome?' In the circumstances, this would have been a reasonable question to ask. The complainant has been understood to communicate her desire that the accused not continue kissing her. In such a situation, should it not then have been incumbent upon the accused to take reasonable steps to inquire into her attitude towards other sexual contact? In this particular case, additional force is lent to the reasonableness of and necessity for such inquiry by virtue of the fact that the complainant was only 15 years of age while the accused was 26 and the de facto husband of the complainant's sister.

The determination of the trial judge in this case may have been different had the Criminal Code then contained two of the reforms provided in the Criminal Code Amendment Bill (Tas) 1999. The first of these reforms, contained in s4(b) of the Bill, provides that an accused cannot rely upon the defence of mistaken belief in consent unless he took reasonable steps to ascertain that the complainant was consenting to the act. The second is the reform detailed earlier in this section contained in s4(g) of the Bill which requires the trial judge to direct the jury that the complainant is not to be regarded as having consented just because she did not do or say anything to indicate lack of consent and further that the fact that she did not do or

say anything to indicate free agreement is normally enough to show that there was no free agreement to what took place.

Arguably, these provisions would have directed the trial judge to a different view of the facts in the case under discussion. While the defence of mistaken belief in consent was not in issue in this case, the determination of the *mens rea* for attempted rape involves essentially similar issues. Therefore, the view of mistake mandated by the first reform would, at least, have been instructive as to the appropriate approach to be taken in the analysis of the accused's state of mind. The second reform would reasonably have influenced the determination of the factual existence of consent and concomitantly also affected the analysis of the accused's state of mind in relation to that fact.

Passivity as evidence of the complainant's intoxicated/incapacitated state

Extract Number 4 shows how the evidence of the complainant's passivity was related to the question of whether she was too intoxicated to give a valid consent. The evidence of passivity dealt with in this extract was contained in the video tape of the police interview of the accused.

Extract Number 4

'...first of all consider perhaps the question of whether you are satisfied beyond reasonable doubt that she wasn't able to give a rational opinion on the matter to which consent was given, namely, will you have sexual intercourse, because she was so affected by liquor or drugs or otherwise. It is a critical passage [in the video tape], it seems to me. The police officer asked him, "she said that to you ["I want to make love to you. I want to have a baby to you."]" And the accused said, "Yes" and then he said, "We started kissing and playing with each others' bodies, you know, and then I took her shorts off", and he said she didn't assist him. He said, "She was just passive and let me take them off". Well, you've heard later in the interview the police question, if she's got this big cut under her chin²⁰⁷ why there wasn't any blood on his face if they were kissing as he said they were kissing. That is something you would no doubt want to think about. And then the interview goes on with the police officer saying, "Now just hold on. She didn't actually assist you?" "No, she didn't." and here comes another critical passage in it, you might think, "She was still stunned?²⁰⁸ Would I be right in assuming this?" "I suppose she was." "And she was still bleeding?" "It was possible she was." "Did you think she was in a fit state to make a decision?" "No, she wasn't." "And yet you're saying to me that she said to you that she wanted to make love to you?" "Yes." "That she wanted to have a baby with you?" "But I didn't believe that." "You didn't believe that, but did that stop you taking her clothes off?" "No." "Even though she was just laying there?" "No". So that, you might think ladies and gentlemen is an important part.'²⁰⁹

Non-directional summation on evidence of passivity

Extract Number 5 illustrates the way that trial judges usually summed up evidence of complainants' lack of resistance, that is, without suggesting possible interpretations of that evidence.

Extract Number 5

'She said that she was laying there and so, basically, it seemed to me her description of that was that she was just passive, passively lying there, allowing it to happen. She said she wasn't reacting in any way and she said then he thought he heard a car and he got dressed and she asked if she could get dressed and he said, "No". And then he went down to the roller door and opened it and that's when she said she could see him with the outline of the gun down on the –

²⁰⁷ Earlier in the evening the complainant had fallen down some stairs and injured herself.

²⁰⁸ The police officer is referring here to the complainant being stunned by a fall she had had earlier in the evening.

²⁰⁹ Case number 18.

It was moonlight outside and she could see the outline of it and she said while he was down there she got dressed. Right, well, that's essentially her version of those events and on the basis of that version, was she consenting? If you accepted her version, was she consenting?'²¹⁰

Passivity and the defence of mistaken belief in consent

Evidence that the complainant did not resist or respond to the accused may provide a foundation for the defence of mistaken belief in consent. In ten trials where the defence of mistaken belief in consent was left to the jury, the trial judges referred to evidence of the complainants' lack of resistance. Nevertheless, the relevance of that evidence to the issue of mistake was not usually specifically spelt out and the possible implications of that evidence for that defence were not explored in detail. However, statements in three trial judges' summations did make a specific link between complainants' unresisting behaviour and the defence of mistaken belief in consent. The first of these summations, extracted in Extract Number 6 below, occurred in one of the cases where the Crown alleged that the complainant was incapable of giving a valid consent by reason of intoxication. In this case, the evidence of passivity was dealt with as evidence consistent with gross intoxication and, on that basis as potentially giving the lie to any claim of mistaken belief in consent. In contrast, in the other two cases, the trial judges indicated that a passive response on the part of the complainants might provide the foundation for the accused's belief that the complainants were consenting. The relevant portions of these summations are contained in Extracts Number 7 and 8 below:

Extract Number 6

'And then he said [to the police] he only went on for about a minute and pulled out. "Why was that?" "Because I thought it was wrong." "Because when you say you thought it was wrong what do you mean?" "I was just thinking about the way she was looking and her state, the state she was in, and the fact she was dazed." "Dazed and irrational?" "Her?" "Yeah. Do you think she was able to make a ..." and you'll listen to this, no doubt – some over talking here, so it went like this a bit I think. The police officer said, "Do you think she was able to make a ..." and the accused interrupted, "She wasn't able to make a" Police officer – "consent, a proper consent as to what you were doing? Do you think that in your own mind?" And the accused said, "Not really." "Did you think that at the time?" That is, to the accused, "Did you, the accused think about that at the time?" And he said, "No, because she was under the influence of drugs". So you see, there is another important passage in the interview'.²¹¹

Extract Number 7

'Or it may be that you as a jury accept that the girl never consented but don't accept all of the version that she gives. In other words, that she was over-awed and in fear but passive from the beginning. In other words, that there were mixed signals. She wasn't consenting, he had been rough but, of some [of] the clear evidence of what she says is rape you may not be satisfied. So, you are left with no consent. She's raped from where she stands or lies, there's no doubt about that but you're not satisfied as to all the external signs, I suppose. Now under those circumstances you may say, "Well he may have thought honestly and reasonably that she was consenting". Now he raises that in the second [police] interview and then says, "But part of it's wrong because she didn't do anything to show me change of mind" (sic) ...

'You may find that she never consented but he believed she was consenting. I'm not saying you will, but you may find that. You may find that she was not consenting but was passive; that she was not consenting but in the circumstances he believed that she was. He doesn't say that but it remains a question for you. So, if he had that belief all the time there was sexual intercourse then the verdict would be not guilty – end of debate'.²¹²

²¹⁰ Case number 51.
²¹¹ Case number 18.
²¹² Case number 8.

Extract Number 8

'There are three matters you have to bear in mind in considering this aspect of the case. Firstly, the belief must be an honest one, that is, one which was honestly and genuinely held by the accused, not just a case of not believing one way or the other and just going ahead on the off chance that the girl might be consenting, but honestly and genuinely believing she was, in fact, consenting. And, secondly, it has got to be a reasonable belief in all the circumstances of the facts as you find them. That is, there must be a reasonable belief on the whole of the evidence. If she were compliant and made no protest and concealed any distress she had there would clearly be matters you would consider in addressing the question of whether or not he either held the belief genuinely and honestly and whether or not the belief was held on reasonable grounds'.²¹³

As with the case where the trial judge withdrew the issue of attempted rape from the jury because of the complainant's passive behaviour, the trial judges in the cases from which Extracts 7 and 8 were taken, analysed the accused's state of belief according to the complainants' conduct and their possible failure to communicate their refusal of consent. There was no attempt made to examine the accused's conduct and determine what they did to come to an understanding of the complainants' willingness to engage in sexual conduct. As with the earlier case, to have required the accused in these cases to make some enquiry of the complainants along these lines, as a precondition to the availability of the defence of mistake, would not have been unreasonable.

In the case from which Extract Number 7 was taken, the accused had met the complainant for the first time less than an hour before the alleged offences occurred when she was walking home alone in the dark. To all intents and purposes he was a stranger to her. He certainly had no length of acquaintance upon which to base an assessment of her wishes without some explicit enquiry. The night was cold and the sexual contact that he alleged was consensual took place on the rough ground of a churchyard. In such circumstances, one would think that the complainant's lack of resistance could be ascribed to a number of things other than consent – fear for example, or even being taken by surprise.

In the case from which Extract Number 8 was taken, the accused broke into the complainant's house at three o'clock in the morning, carrying a knife. He had had a previous relationship with the complainant and had been, for a time, engaged to be married to her. That relationship had, however, ended by the time the alleged offences occurred and after it concluded, as a result of the accused's violent behaviour towards her, the complainant had obtained a court restraint order against the accused, enjoining him not to approach her. He was in breach of that order when he went to the complainant's house on the night when the events being tried occurred. The jury convicted the accused in this case of aggravated burglary but acquitted him of a charge of rape. The defence of mistaken belief in consent was not relied upon as part of the defence case but was left to the jury on the judge's own motion. It seems incongruous in such a case to suggest that the complainant's compliance or lack of resistance might reasonably be interpreted by the accused as signalling her consent. That compliance is most logically ascribable to the violent history of her relationship with the accused, the existence of the court restraint order and the accused's manner of gaining entry to her house which were all of a piece. This begs the questions - should the defence of mistaken belief in consent be left to the jury in respect of any accused placed as was this accused, solely on the basis that the complainant was unresisting? Or should it be incumbent upon such an accused to take reasonable steps to ascertain that consent was genuine and that the complainant was not merely passively submitting to the inevitable?

In the circumstances of both these cases, it seems appropriate that the availability of the defence of mistake should be conditional upon the accused having taken reasonable steps to ascertain that consent was freely given. Had this been a legal requirement at the time that these cases were tried, it is likely that the trial judges in these cases would have approached the issue of mistake differently. Passivity on the part of the complainant would not have supplied a sufficient evidentiary foundation for the defence. There would have been the additional necessity of evidence of active measures taken by the accused to ascertain agreement.

4.9.2 Communication in Relation to Consent

The present study has shown that even when accused testified they were not always questioned about what steps they may have taken to ensure that complainants were consenting to sexual contact.²¹⁴ In contrast, complainants were always questioned about what they did to communicate their lack of consent to the accused. In recent years, there has been concern that the current law relating to sexual offences operates in an unbalanced way in that it effectively places all responsibility for communication in relation to consent upon the complainant. For example, it was noted in the report of the Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary* that, 'The law's focus on the victim's behaviour when determining the issue of consent has been a perennial source of difficulty'.²¹⁵ It has, therefore, been argued that sexual partners should bear mutual responsibility for ensuring that sexual contact occurs with free agreement. This approach seeks to create what has been termed a 'communication standard'²¹⁶ in sexual relations so that an accused cannot assume consent exists unless a complainant has positively communicated her agreement to engage in sexual activity. It also requires that an accused who claims to have been mistaken about the complainant's willingness to engage in sexual activity take reasonable steps to ascertain the complainant's willingness in this regard. This approach is embodied in reforms contained in the Criminal Code Amendment Bill 1999 (Tas) (version 2), ss4(a), (b) and (g).

The present study was, therefore, interested to learn how trial judges dealt with the parties' communication about and ascertainment of consent when summing up to juries. The specific questions asked in relation to this matter were, to what extent and how did trial judges deal with the accused's participation in the communication of consent? Did trial judges scrutinise the accused's conduct in this regard or was their scrutiny concentrated upon the complainants' behaviour? How was evidence that complainants had physically resisted the accused or verbally refused consent dealt with by trial judges in relation to consent and mistaken belief in consent?

The research was particularly interested to learn how trial judges approached this matter in cases where the defence of mistaken belief in consent was left to the jury. This is because in such cases, the accused's state of belief and the honesty and reasonableness of that belief are of central concern to the jury. Logically, it should follow that the basis of the accused's belief, how it came to exist and what, if any, steps the accused took to verify the validity of that belief, would be centrally relevant to juries' determination of both the honesty and the reasonableness of that belief.

It was found that in all cases, trial judges dealt with questions concerning both the existence of consent and the honesty and reasonableness of any mistaken belief that complainants' had

²¹⁴ See para 2.6.10 above.

²¹⁵ Senate Standing Committee on Legal and Constitutional Affairs, (1994) *supra* p 33.

²¹⁶ B McSherry, (1992), *supra*; The Hon. Justice EW Thomas (1994), *supra* pp 427-432.

consented by examining the complainants' conduct and querying whether that conduct could reasonably have been construed as consistent with consent or whether, on the contrary, it was inconsistent with genuine consent and would have disabused the accused of any mistaken belief they may have held. In two cases, the trial judges specifically stated that if the jurors accepted that the complainants had verbally rejected the accused's sexual advances, they might well conclude that any belief in consent on the part of the accused could not have had a reasonable basis.

In a small number of cases, reference was also made to positive steps that had been taken by the accused to obtain complainants' consent. However, such references were exceptional and ran counter to the general trend found in judicial summations where, more usually, attention was focused exclusively upon complainants' conduct as evidence of their and, concomitantly, of the accused's state of mind. Moreover, when reference was made in the summations to the accused's attempts to obtain or ascertain consent, those attempts were not explicitly dealt with as a possible basis for assessing either the existence of genuine consent, or the honesty or reasonableness of any mistaken belief in consent that the accused may have had. Usually such references were simply included in the trial judges' narration of the competing versions of events. This means that in no case examined in the present study was the reasonableness of the accused's mistaken belief in consent assessed according to what he did or did not do to verify that belief.

The following extracts taken from trial judges' summations demonstrate these different approaches. Extracts Numbered 1 - 4 show how trial judges dealt with the issue of mistaken belief in consent by reference to the complainants' conduct. Extract Number 2 is additionally interesting because in it, the trial judge mentioned the fact that the accused did not expressly ask whether the complainant consented to digital penetration and intimated that attempted communication of this sort is not a necessary precondition to reliance upon the defence of mistaken belief in consent. In Extracts numbered 3 and 4 the trial judges explained the implications for the defence of mistake of evidence of the complainants' verbal and physical rejection of the accused's sexual advances. Extract Number 5 is an example of a case where the trial judge made reference to an explicit question asked by the accused to obtain the complainant's consent. It illustrates the study's finding that such evidence was incorporated into the narrative of the accused's version of events and was not singled out or dealt with as having distinct or special relevance to the issue of mistake.

Complainants' conduct as communicative

Extract Number 1

'The accused said that [the complainant] was consenting to the removal of her clothing. She says she was not consenting. You might come to the conclusion that she was not, in fact, consenting to the removal of her clothing, for example, the socks and boots that he says he removed when she was lying on the bed apparently without any indication from her that she wanted them removed. But, nonetheless, you might well think he reasonably and honestly believed in the circumstances, by reason of her demeanour, for example, that she was consenting at the time'.²¹⁷

Extract Number 2

'Now consent can be conveyed in various ways. It can be by words or by conduct and there is no suggestion here by anyone there was any express consent by words given. There was no suggestion by the accused when he was interviewed that he asked the complainant whether he could penetrate her vagina with his finger and she said, "yes", no suggestion like that at all. But you need to put yourself in the bedroom where this act occurred, (and there is no argument about that), and say, is it reasonably possible that by reference to the conduct of the parties, the complainant laying on the bed or going to the bedroom, laying on the bed, the way she was laying there, what occurred between them, is it reasonably possible that he did honestly and you've got to put yourself in his mind really as to whether he was honest – and reasonably, and that's a matter for your judgment as to whether it was reasonable - in all the circumstances in which he found himself including the fact that he'd been drinking, but mistakenly believed that she consented to that assault?'²¹⁸

Complainants' verbal rejection or physical resistance**Extract Number 3**

'If, in fact, you were to find that [the complainant] said "no" on several occasions in the way that she described, that could well be the end of the issue as far as you are concerned because there's no plainer way of manifesting a lack of consent, one would think, than to say "no". "No" means "no", despite some of the discussions which took place a few years ago about some judges on the mainland suggesting otherwise, "no" means "no" and as someone once said "which part of the word "no" don't you understand?". "No" means "no" and if "no" was said and said forcefully on a number of occasions, you might well think that that would remove any possibility of any honest and reasonable belief in consent and would be a clear manifestation of lack of consent, but that's a matter for you'.²¹⁹

Extract Number 4

'If you find from the evidence that [the complainant] was calling out and saying many times, "Stop, stop. It's hurting", or as she said, "Heaps of times", then even if you think it's reasonably possible that he did have a mistake about that, it wouldn't be based on reasonable grounds, would it? It couldn't be a reasonable belief if she was saying to him time after time, "Stop, stop, stop". So that's how you apply that third element and it's for you to say whether any possible belief that you think he might have had, mistaken belief, is based on reasonable grounds'.²²⁰

Communication by the accused**Extract Number 5**

'Well, I will go on to the sexual activity in the shed and just take you back to that passage [in the record of the accused's interview with the police]. ... And I want to take you to the middle of the page, the middle of that paragraph of his long answer. Just above the middle of the page towards the end of the line he says, "We got up to Is. and I turned the shed light on. I could see there was a bit of blood on her head there and a bit of a lump more than anything. I had a feel. I couldn't see through her hair and I think she had a little bit, it was from the back, and a bit of blood on the front there. [I] tried to wipe it off. I said, "Well, jump up on the hay". And we jumped up on the hay and first off she said she was thirsty. I had a bottle of water – a plastic bottle thing, and she said she wanted a drink so we both had a drink of that and for about five minutes and we stood there and I said, "Oh, we'll jump up on the hay anyway". We jumped up on the hay and something came up about sex. I said, "Can I have sex?" She agreed to it and she took her clothes off. I took me trousers and socks and boots and that off. Where we was on the hay there was, sort of, rafters there so we both moved the hay around."

So, it wasn't just him he says. They both moved the hay around.

²¹⁸ Case number 30.

²¹⁹ Case number 55.

²²⁰ Case number 28.

“She said”, (she had a nightie on, apparently, underneath), “she said, ‘Do I have to take me nightie off?’” and I said, “No””.

Well, it just occurred to me, is that an indication she is really asking for permission rather than participating by consent in the sex act? But anyway she asked did she have to take it off and he said, “No.” She said, “The hay’s pretty prickly”. And he said, “And it just started off. I give her oral sex for a couple of minutes and then I asked her to give me oral sex. She didn’t object. Then we made, we made love. It was like a quick one and then she got up and I just sat there on the hay for a while and she kept cuddling me and she ended up asking me did I want to finish and I said, “No, I’ve already finished”. And she said, “Can I get dressed?” and I said, “Yes”, if she wanted to. Then we sat there for probably fifteen or twenty minutes afterwards and, sort of, talked all about me problems” and what he’d done and then he talked about the lights coming and he took off and left her there.

‘Now that’s the only version of those events that you have from the accused and the police didn’t ask him detailed questions about that later. I remind you that the issues with respect to the charges of rape are: did she consent or was that, those forms of sexual intercourse without her consent? And is it possible that he honestly and reasonably, in your view, believed that she was consenting?’²²¹

Extract Number 5 is also interesting because the trial judge analysed the communication that occurred between the complainant and the accused with a degree of subtlety. Of particular note in this regard is His Honour’s query whether the complainant’s question about having to remove her night dress might not be indicative of forced compliance rather than freely given consent. But, it is also noteworthy that it was the complainant’s verbal communication that was singled out for attention in relation to the issue of consent. The possible relevance of the accused’s request to have sex with the complainant was not examined.

These Extracts raise the question whether notions of mutuality in relation to the communication of consent should be incorporated into the defence of mistaken belief in consent. Is there already, a sufficient exploration of the factual issues relating to the honesty and reasonableness of any mistaken belief in consent without inclusion of this additional matter? A number of the trials examined in this study do suggest, however, that notions of mutuality would add a useful dimension to the analysis of the accused’s state of mind. This has already been considered in the discussion of the use of evidence of passivity as conveying consent and as providing grounds for a mistaken belief in consent.²²² However, its potential usefulness is also revealed by those trials where there was evidence from police records of interview that the accused had, in fact, been made aware before or during the course of sexual intercourse, that the complainants either did not consent or that their consent had been withdrawn. This was the situation in the trials from which Extracts numbered 1 and 4 above were taken. The following Extract, Extract Number 6, is taken from a third trial where this situation arose.

Extract Number 6

‘Bearing in mind that it is for the Crown to show that he was acting without that belief, without that mistaken and reasonable belief. So that’s the test. As I said, you may not get to it, but that’s what you might, you might if you reject, weren’t satisfied beyond reasonable doubt of all her account and had rejected his account given here. And it arises – I’ll just give you an example – I’m quoting [from the police record of interview], “How did her demeanour change from her saying, “no”, to her giving you permission and that she meant, “yes”?” “Well she didn’t say “yes”. She didn’t say anything about, you know. She didn’t say “yes”. She said, “no” first”. Question: “Is it correct that you’re assuming that even though she said, “no” are

²²¹ Case number 51.

²²² See discussion in para 4.9.1.

you assuming that she wanted to have sex after she said that?" "No". Question: "So it's in your mind, do you think she wanted to have sex?" "Ah, yes she did".

'Now it might not trouble you, but it's my duty to tell you what the law is and how we go about it. So, that's mistaken belief'.²²³

Where there is evidence of such an acknowledgment by the accused that the complainant had refused consent, whether temporarily or otherwise, it would arguably be justifiable for trial judges to gauge the reasonableness of any possible mistaken belief in consent by reference to whether or not the accused thereafter took explicit and demonstrable steps to clarify the complainant's state of mind and to dispel any uncertainties he must, under such circumstances, have had in this regard. After all, can a mistaken belief in consent be said to be reasonably founded when there is evidence that the accused heard the complainant to say, 'no', unless he took positive steps to ensure that the complainant subsequently genuinely meant, 'yes'? To maintain that it can, comes perilously close to revivifying the discredited stereotype that 'no' may mean 'yes'.

4.9.3 Admissions by the accused

Evidence of admissions made by an accused provides a possible window onto his state of mind and, therefore, is potentially relevant to the defence of mistaken belief in consent. In nine trials where the defence of mistaken belief in consent was left to the jury, evidence of admissions made by the accused to the police was adduced by the Crown.

In four of these trials that evidence concerned admissions that the accused had continued to have sexual intercourse after he became aware that the complainant had withdrawn an alleged initial consent. *Prima facie*, such evidence not only established that the complainant was not consenting to sexual contact, but also that the accused could not have been, or could no longer have been, mistaken about that fact. In all of these cases, the trial judges related that evidence to the question of consent. In one, it was also related to the defence of mistake. The trial judge stated:

'On the evidence of his second interview [with the police] you might find that she never consented, never consented at all but at some stage he believed her to be consenting and something happened which made him aware that she was not, in fact, consenting. And that is the, "no, no, no" in that second interview. It is the version given by him to the police. Now, that is that he had a belief but something happened which changed his belief. Now, if you found that, then it is guilty of rape. It is guilty of rape by continuation. And if we kept our memorandum open, you will now see the significance. If we go back to 2.1.2 – "includes the continuation of sexual intercourse after penetration". So we can read, "and includes continuing with sexual intercourse" when his mistaken belief has changed. That's still rape you see. So, it would be guilty of rape by continuation, because he did not have an honest and reasonable mistaken belief'.²²⁴

The following Extracts from two trials are typical of the way that admissions made by the accused to the police were related by the trial judges to the issue of whether the accused was mistaken about the complainants' consent.

Extract Number 1

'... even if the woman or girl is not consenting to the sexual intercourse, a person is not guilty of the crime of rape if he honestly and reasonably believes that she is consenting to it. Now, the accused said to the police that they'd done this many times before and he'd touched her before and I think he said he believed she was consenting, "she always consented or she was consenting", he said. Now, you would have to consider whether she was or wasn't and did he

²²³

Case number 25.

²²⁴

Case number 8.

believe that she was and if so was that an honest belief he held and, if so, in your view, was it a reasonable belief in the circumstances as you find they were. So, that's what's being raised there.²²⁵

Extract Number 2

'Then of course, looking at that last one [honest and reasonable mistake of fact], you look at all you have to decide, what you think happened up there in, when, I suppose, the whole time the two of them were together you see. What happened? They are the grounds upon which you consider this question of any claim to honest or mistaken belief, and indeed at the very end, the very end of his interview with the police on the video, that is what he said, "Is there anything you want to say in respect of this matter, Michael?" "No, only that I should have taken her to hospital when she needed urgent treatment". "Instead you chose to take her to a lonely park and have sex with her?" "Yes". "Without her consent?" "I thought she did consent me". And so that's how that kind of thing arises and you will have to consider it in the way in which I put it to you. ...

'He said something about taking her clothes off and the police officer said, "Just excuse me, what was her answer?" "I thought she said, "Yes". Now that of course, "I thought she said, "Yes", again goes to that fourth element – honest and reasonable mistaken belief perhaps. ...

'And then he said [to the police] he only went on for about a minute and pulled out. "Why was that?" "Because I thought it was wrong". "Because when you say you thought it was wrong what do you mean?" "I was just thinking about the way she was looking and her state, the state she was in, and the fact she was dazed". "Dazed and irrational?" "Her?" "Yeah. Do you think she was able to make a ..." and you'll listen to this, no doubt – some over talking here, so it went like this a bit I think. The police officer said, "Do you think she was able to make a ..." and the accused interrupted, "She wasn't able to make a" Police officer – "consent, a proper consent as to what you were doing? Do you think that in your own mind?" and the accused said, "Not really". "Did you think that at the time?" that is, to the accused, "Did you the accused think about that at the time?" and he said, "No, because she was under the influence of drugs". So you see, there is another important passage in the interview. ...

'So you'll have to take all that into account, ladies and gentlemen and also the fact that at the very end of the interview, when the accused was asked whether there was anything he wanted to say, he said, as I reminded you on Friday, that he thought that she did consent to have sexual intercourse'.²²⁶

4.9.4 Evidence of violence and force

The prevailing pattern of trial judges' summations when dealing with evidence of force and violence was to juxtapose the essential elements of the Crown and defence accounts of that evidence in a more or less narrative style, indicating what those competing versions said in relation to the question of consent and the defence of mistake. Usually this was incorporated into the trial judges' overall summary of the Crown and defence evidence adduced in the case.

In six trials in the present study, the trial judges related the evidence of force more closely to the issues of consent and mistake and suggested the potential ramifications of that evidence for the determination of those issues.²²⁷ The following Extract from the judge's summations in one of these trials illustrates what was said in this regard. The trial judge indicated that if the evidence of violence testified to by the complainant was accepted by the jury, it would deny the possibility that the accused could have mistakenly believed that the complainant was consenting. This was followed by a summary of the accused's version of events, and an indication of the implications of that version for the defence of mistake.

²²⁵ Case number 3.

²²⁶ Case number 18.

²²⁷ Relevant portions of the trial judges' summations in five of these cases were considered in para. 4.3.3 of this report in relation to the issue of force and consent.

Extract Number 1

'So if you think that that's a reasonable possibility having regard to the whole of the evidence, that he did believe she was consenting and that he had reasonable grounds for believing that she was consenting then you should acquit him. But obviously you would be looking for evidence of some reasonable basis for him to believe that and if you found that she was pushing away against him or that she was crying or that she was telling him to stop, then, it would be a matter for you as to whether you thought there was any reasonable basis upon which he could have believed that she was consenting. ... It would seem to me, and this is just an observation about the evidence, but it would seem to me that if you accept the girl's evidence as truthful as to essentially what happened there, there is very little evidence there upon which it would seem anybody could entertain a belief that she was consenting. I mean, the fact that she goes up a passageway or the laneway might be taken to be an indication, you might think, of a belief that she is willing to go up and engage in some sort of sexual activity, but if you accept her evidence as to what actually happened, that he's grabbed her around the throat and she virtually blacked out and fell to the ground, and the next minute he was on top of her and seeking to penetrate her and was, in fact, penetrating her, then although I acknowledge it is a matter for you, it doesn't seem to me there's very much evidence of any reasonable basis for a young man to believe that the girl in question was consenting'.²²⁸

Statements of this kind, explaining the implications of evidence of violence in this way, were encountered in only six cases in the present study.

The level of force and violence allegedly inflicted in a number of those cases where mistaken belief in consent was left to the jury, in conjunction with the general tendency of trial judges not to specify the possible implications of such evidence for the issues of consent and mistake, raises questions about the current operation mistake as a defence and the role of the trial judge in relation to it. Specifically, there is the question whether it should be the usual rather than the exceptional practice of trial judges to explain the implications of evidence of violence in the way done in the above extract. Additionally, there is the question whether the defence of mistake can legitimately be left to the jury in cases involving force and violence.

As earlier detailed,²²⁹ the present study found that evidence of force and violence was adduced in 17 of the 20 trials where the defence of mistaken belief in consent was left to the jury. The trial judge cannot, of course, decide not to leave this defence to the jury simply because there is other evidence in the case that tells against it. To do so would appear to require a determination of fact by the trial judge that is not within his or her jurisdiction, that is, the truth of the countervailing evidence. Nevertheless, as noted earlier,²³⁰ this defence should not be left to the jury unless there is evidence capable of raising a reasonable doubt as to its existence. It is apparent that there can be profound difficulties for both trial judges and juries in dealing with this defence in cases involving evidence of violence. Such difficulties emerge with most striking clarity in those cases where the jury clearly accepted that the accused had behaved violently, (that acceptance being evidenced by their guilty verdicts in respect of non-sexual offences charged involving that violence), and yet acquitted the accused or returned hung verdicts in respect of the sexual offences with which he was charged.²³¹ They are also evident in those cases where the jury could not reach a verdict and so, returned hung verdicts on some or all counts tried.²³² The facts of two cases where the jury convicted the accused of non-sexual offences involving violence and returned hung verdicts in relation to the sexual offences arising out of the same events serve to illustrate the basis of the concerns raised here.

228

Case number 9.

229

paras 2.6.4 and 2.6.5.

230

para 4.7.1.

231

This occurred in three trials.

232

This occurred in seven trials.

In the first case, the accused was charged with aggravated burglary, aggravated assault and rape. The Crown case was that he broke into the house where the complainant, his ex-de facto wife, was staying with her pregnant sister. Evidence was adduced that the accused was armed with a gun and that before entering the house, he cut the telephone lines to the house. He then tied up and gagged the complainant's sister and forced the complainant at gunpoint to go with him in his car. The complainant attempted to escape by jumping out of the car while it was moving. In doing so she sustained injuries to her head, shoulder, back, arm, elbows, hands, ankle, leg and the side of her body. She testified that she ran to a nearby house and unsuccessfully tried to rouse the occupants to let her in. The accused chased her and forced her back into the car at knifepoint. He then took her to a barn on his father's property where the alleged rapes occurred. The complainant's behaviour during sexual intercourse was unresisting and unresponsive. The accused claimed that the sexual intercourse was consensual. He pleaded guilty to the charge of aggravated burglary and was convicted on two counts of aggravated assault. The jury was unable to reach a verdict on the two counts of rape with which he was charged and, therefore, returned hung verdicts.

In the second case, the accused was charged with aggravated assault and five counts of rape. The accused and the complainant had, for some months been involved in a girlfriend/boyfriend relationship but, according to the complainant, that relationship ended a few weeks prior to the occurrence of the events comprised in the charges against the accused. The Crown case was that at nine o'clock on the evening of the offences the accused arrived at the complainant's house, carrying a gun. He parked his car some way from her house and cut the telephone lines before knocking at the door. On gaining entry he turned off all the lights. During the remainder of that night and during a substantial portion of the following day the accused threatened the complainant with the gun, telling her that he was going to kill her and describing the means he intended to use to disguise her murder. At one point he aimed the gun at the complainant's head, then fired it beside her head into the chair on which she was sitting. Subsequently the events comprised in the rape charges occurred.

The complainant testified that she had submitted to sexual contact because of the presence of the gun that was at all times within reach of the accused. Her response, she said, during sexual intercourse had been passive. At trial the accused denied that the sexual contact comprised in a number of the counts had occurred and claimed that the sexual intercourse that did occur was consensual. He denied threatening the complainant with the gun and said that he had visited her to commit suicide in front of her. Before leaving the complainant's house he wrote a suicide letter in which he admitted that he had raped the complainant. This was done, he later said, so that the complainant would not be blamed for his death. He then pretended to shoot himself in his car while the complainant watched, but minutes later he drove away. This case was tried twice. At the first trial, the accused was convicted of the charge of aggravated assault comprised in firing the rifle into the chair beside the complainant's head. He was acquitted of one count of rape and the jury returned hung verdicts in respect of four remaining counts of rape. At the second trial, the accused was convicted of those four remaining counts of rape.

One of the most interesting features of the second case is that the defence of mistaken belief in consent was left to the jury in the first trial of the case but not in the second. Clearly that is a major distinction between the two trials of this case and one that, by itself, suggests that the defence of mistake is problematic for juries and currently operates so as to obfuscate the issues being tried.

In the trial of the first case, the trial judge dealt with the evidence in relation to the defence of mistaken belief as follows:

‘What the law is – that if he honestly and reasonably believed that she was consenting then he would not be guilty. Not the matter of whether he believed it, but whether he honestly believed it and whether he reasonably believed it. So, it is a question of the belief being a reasonable one which is equally important. Now, it might be, it is entirely a matter for you, that the accused may have believed that she was consenting and if you think that that belief may have been an honest one and if you think that on all the facts it was a reasonable belief for him to hold, then if you are left with a reasonable doubt about any of that, he is entitled to the benefit of that reasonable doubt and your duty would be to find him not guilty in respect of those counts or the count 4 or the count 5. Such a belief does not have to be induced by [the complainant], by anything she said. You must consider whether he may or may not have had an honest and reasonable belief as to her consent by reference to all of the evidence, what he said to the police and her evidence and all of the evidence in the case. You would have regard to what happened back at W Street [the street where the complainant was living] even, perhaps, and everything right back from the start of the night’s incident, night’s affairs, and perhaps previous weeks. I emphasise that this question of mistake will only arise if you are persuaded beyond reasonable doubt of the other elements of the crime of rape’.²³³

The next reference to the defence of mistaken belief in this summation occurred after the trial judge had summarised the major components of the Crown and defence evidence adduced in the case, finishing with a recitation of portions of the transcript of the police interview of the accused. This concluded as follows:

‘Well, I will go on to the sexual activity in the shed and just take you back to that passage [in the record of the accused’s interview with the police]. ... And I want to take you to the middle of the page, the middle of that paragraph of his long answer. Just above the middle of the page towards the end of the line he says, “We got up to Is. and I turned the shed light on. I could see there was a bit of blood on her head there and a bit of a lump more than anything. I had a feel. I couldn’t see through her hair and I think she had a little bit, it was from the back, and a bit of blood on the front there. [I] tried to wipe it off. I said, “Well, jump up on the hay”. And we jumped up on the hay and first off she said she was thirsty. I had a bottle of water – a plastic bottle thing, and she said she wanted a drink so we both had a drink of that and for about five minutes and we stood there and I said, “Oh we’ll jump up on the hay anyway”. We jumped up on the hay and something came up about sex. I said, “Can I have sex?” She agreed to it and she took her clothes off. I took me trousers and socks and boots and that off. Where we was on the hay there was, sort of, rafters there so we both moved the hay around”.

‘So, it wasn’t just him he says. They both moved the hay around.

“She said”, (she had a nightie on, apparently, underneath), “she said, “Do I have to take me nightie off?” and I said, “No”.”

‘Well, it just occurred to me, is that an indication she is really asking for permission rather than participating by consent in the sex act? But anyway she asked did she have to take it off and he said, “No”. She said, “The hay’s pretty prickly”. And he said, “And it just started off. I give her oral sex for a couple of minutes and then I asked her to give me oral sex. She didn’t object. Then we made, we made love. It was like a quick one and then she got up and I just sat there on the hay for a while and she kept cuddling me and she ended up asking me did I want to finish and I said, “No, I’ve already finished”. And she said, “Can I get dressed?” and I said, “Yes”, if she wanted to. Then we sat there for probably fifteen or twenty minutes afterwards and, sort of, talked all about me problems” and what he’d done and then he talked about the lights coming and he took off and left her there.

‘Now that’s the only version of those events that you have from the accused and the police didn’t ask him detailed questions about that later. I remind you that the issues with respect to the charges of rape are: did she consent or was that, those forms of sexual intercourse without

her consent? And is it possible that he honestly and reasonably, in your view, believed that she was consenting?’²³⁴

This summation gave little guidance to the jury as to how the evidence adduced in the trial might be applied to resolve the question of mistaken belief in consent one way or the other. The jury were left substantially to their own devices in applying the evidence to the law. No attempt was made to highlight or consider evidence that might be thought to be particularly germane to this issue. It did not indicate what would be the consequences for the determination of mistaken belief in consent of the jury’s acceptance or rejection of particular evidence. The summation referred to the entirety of the evidence. It summarised the Crown and defence evidence adduced in the case but it did not relate the evidence to the law with any particularity. For example, it did not explain *how* the evidence of what occurred at W Street was relevant to the determination whether the accused was or was not mistaken about the complainant’s consent. When referring to the police interview with the accused, no suggestion was made concerning which part or parts of that interview might bend most significantly upon this issue. Additionally and most relevantly for the discussion here, His Honour made no specific reference to the evidence of violence and did not attempt to explain how the acceptance or rejection of that evidence could affect the jury resolution of this issue. In this regard, it is instructive to compare this summation with that extracted in Extract Number 1 above, where the implications of evidence of force, if accepted, were explained.

Further, it is not clear on what evidentiary basis the trial judge felt justified in leaving this defence to the jury in the first place. What was the evidence in the case that was capable of giving ‘an air of reality to the defence’?²³⁵ Unless such evidence is identified with some degree of specificity, doubts must remain about whether the defence has been legitimately left for the consideration of the jury.

In the first trial of the second case, the trial judge summed up the defence of mistaken belief in consent as follows:

‘You need to be satisfied before you can convict on any one of those counts of rape, and you will consider each of them separately, that the accused had sexual intercourse without her consent, which you now understand, and that he did not honestly but mistakenly believe on grounds that the jury think reasonable that she did consent. Now in this case the evidence is, on the Crown side, that consent was clearly procured by this threat. The gun was always there. His behaviour all night was such and the presence of the gun that she was in fear of being seriously harmed and so she gave in under that threat. On the other hand, the defence case is, bearing in mind that there’s no need for the defence to prove anything, but as it was put to you it was, not at all (sic), after the initial suicide incident, things settled down and sexual intercourse was completely consensual. However, I don’t know what view you will take of the evidence. You may take a middle course about it. I don’t know. So, in order to cover every eventuality I give you that direction there as to element four, that a person is not guilty of rape if he honestly but mistakenly believes on grounds that you, the jury think reasonable that there was consent. ... Now he didn’t claim that. She didn’t give any grounds for suggesting that, but I give you that direction. You may well think, “Oh, well that doesn’t arise in this case, on our view of the facts”. But I don’t know what view you will take of the facts so, I give you that direction, as I do in, I think almost every rape case, this honest and mistaken belief. But it’s up to you, if you think that’s reasonably possible, to assess whether the grounds of that belief are reasonable’.²³⁶

²³⁴ Ibid.

²³⁵ *R v Esau* [1997] 2 S.C.R. 120; *R v Osolin* [1993] 4 S.C.R. 595; *R v Ewanchuk* (1999) 131 C.C.C. (3d) 481.

²³⁶ Case number 26.

Like the summation in the first case extracted above, this summation did not identify, for the benefit of the jury, any particular evidence in the case that might assist in the determination of the question whether the accused honestly and reasonably but mistakenly believed that the complainant was consenting to sexual intercourse. The trial judge referred to the essential elements of the Crown and defence versions of events, but did not relate those versions or the evidence adduced in support of them to the issues involved in the defence of mistake. His Honour mentioned that the jury might take a 'middle course' about the evidence but did not explain what that 'middle course' would comprise or what possible view of what evidence would result in that 'middle course' being taken. Given that the Crown case was heavily reliant upon evidence of violence and given that the defence case was as equally heavily reliant upon the jury accepting that any violence that had occurred was not directed at the complainant and had, in any event, ceased by the time that sexual intercourse took place, it is surprising that the trial judge did not comment upon the significance of these conflicting accounts for the defence of mistaken belief in consent. It is submitted that it would have been potentially helpful for him to have done so.

In paragraph 4.7.1 above it was suggested that where trial judges adopt an essentially hands-off approach in relating the evidence to the law, that is, where they explain the law and refer to the facts but do not apply the latter to the former, (as, it is submitted, essentially occurred in both these cases), the summations may fail to meet the established requirements set for judicial summing up.²³⁷ Such summations, as was argued in paragraph 4.7.1 and as is argued again here, may provide insufficient assistance to the jury. They may leave the jury to sift unguided through a mass of evidence, ill equipped to sort the wood from the trees or to distinguish an appropriate way to resolve, on the evidence adduced, the issues that have been tried.

Both these cases also suggest that there is a useful role in sexual offences trials for the reform contained in s4(b) of The Criminal Code Amendment Bill 1999 (Tas), which makes the availability of the defence of mistaken belief in consent conditional upon the accused having taken reasonable steps to ascertain that the complainant was consenting. It is submitted that had this reform existed at the time when these cases were tried, it would have assisted the trial judges in determining whether this defence was appropriately available to the accused as a matter of law and the jury in determining whether it was applicable as a matter of fact. The test contained in s4(b) provides a simple and common sense mechanism for judging whether an accused's mistaken belief can be said to be truly reasonable. It excludes the possibility of a belief being considered to be reasonable where the accused has not taken reasonable steps to verify the existence of consent. Its affect would be to remove the defence in many cases where it is now apparently left as a matter of course. Further it would equip trial judges with the means to direct juries on mistake in ways that may presently be thought to be inappropriate. In neither of the cases considered here was there evidence that the accused had taken such steps. In the second case, this absence would in all likelihood have resulted in the trial judge not leaving this defence to the jury of his own motion as a matter of general practice. In the first case, it may have resulted in the trial judge giving a keener analysis to the facts and evidence in order to satisfy himself and to instruct the jury concerning the application and determination of this defence.

²³⁷ *Alford v Magee* (1952) 85 C.L.R. 437 at 366; *Lawrence* (1981) Cr. App. R. 1 at 5.

4.9.5 Evidence of physical injury or damage to clothing is a reasonably expected concomitant of genuine non-consent.

In only two trials in the present study was it found that trial judges had commented to juries that the absence of injury to the complainant or to her clothing might be relevant to their determination of the presence or absence of consent. In the first trial this comment was as follows:

‘You may think that in some circumstances that you would expect the girl to scream or struggle so violently as to produce observable injuries and that may create a doubt in your mind, which you consider to be a reasonable doubt. It is a matter for you. On the other hand individual personalities and reactions to unwanted incidents do vary and you may consider that her failure to cry out and struggle more violently than she did, or to say more than she did, is understandable in the circumstances’.²³⁸

In the other trial, the trial judge said,

‘You may well think it would be difficult to rip off boots in that sense but you will no doubt look at the clothing and, in particular, the overalls. Although it’s a matter for you, when you see them you may well conclude that there is no evidence of any forcible removing at all, that they’re entirely undamaged and that’s an important piece of evidence, you may think, because if it had been ripped off, whatever that was intended to convey, you might think that there might have been some damage to the article of clothing. Now, I should say to you that for the purpose of examining exhibits you will be provided with a supply of surgical gloves. We take precautions with exhibits of this personal nature. One never knows, there might be some infection there and I wouldn’t wish a member of the jury to suffer any harm as a result of serving on a jury, so, I suggest to you that you use them if you want to handle those exhibits’.²³⁹

In the same case the trial judge dealt with evidence of injuries to the complainant as follows:

‘Now there’s evidence before you of bruising and tenderness to the various parts of [the complainant’s] upper body and also of some markings on the vaginal area. There’s evidence of some of those things being consistent with the account given by [the complainant]. Well, all that “consistent” means, of course, is that it doesn’t disprove her story. It doesn’t mean that it actually proves what she has told because a particular bruise, for example, may be consistent with it having been caused in a particular way. It may be equally consistent with a lot of other things. Now you may consider the sign of some slight injury to the vagina as being consistent with an act of intercourse and, of course, the accused admits an act of penetration. So, it’s possibly related to that. We don’t really know what else it might be consistent with, of course. But you may consider more important the evidence of the bruising and tenderness or tenderness of the upper body, bruising to the leg and to the upper body, the various bruises described by medical witnesses, and, of course they’re to be seen in the photographs. Now on the evidence which the accused gave you, of course, there is another explanation why [the complainant] may have been suffering from bruising and tenderness and that is his evidence as to the altercation involving some physical violence between [the complainant] and [her husband] on the occasion that Mrs T was on the telephone. Now, if you think that might reasonably be true, you don’t have to be satisfied that it is, but if it might reasonably be true, then, of course, you really wouldn’t place any reliance on those signs of injury or trauma as supporting [the complainant’s] case’.²⁴⁰

The comments in these extracts are exceptional. More usually, as has been discussed in para 2.10.2 above, trial judges directed juries that rape does not necessarily involve force, violence or injury. In one case the trial judge even suggested to the jury that absence of injury or damage to clothing was not necessarily a factor favouring the defence case:

²³⁸ Case number 9.
²³⁹ Case number 19.
²⁴⁰ Ibid.

‘As [defence counsel] said there was no damage to [the complainant]. There is no medical injury to her, no tearing of her clothing, anything of that nature. But that might be something of a two-edged sword I suppose if you’re thinking in terms of this being a set-up. If a woman is going to set up a man, that is falsely accuse him, you might think that to give that accusation some sort of credence she might tear the slip or produce some bruises or something of that kind. It might be that these sort of speculations don’t help you at all because they are, after all, only speculations’.²⁴¹

In summary then, while it was unusual for a trial judge to construct evidence of absence of injury to complainants or lack of damage to their clothing as potentially consistent with consent or to portray such injury and damage as a reasonably expected concomitant of genuine non-consent, it is apparent that this view does still find expression.

Chapter Five: Conclusions and Recommendations

5.1 Consent

The present study found that the issue of consent was the central matter for determination in the majority of sexual offences trials occurring during the period of the study. It also found that absence of consent was predominantly constructed by the Crown on the basis that the complainants' compliance was obtained through the use of physical force. The dominant themes in the defence constructions of consent and mistaken belief in consent were that the complainants were lying about not having consented, that they were responsible for or contributed to the occurrence of sexual contact and that they offered inadequate resistance or inadequately communicated their refusal of consent to the accused.

It was also found that, even though the Crown typically relied upon evidence of physical force to establish absence of consent, the extreme levels of violence and major injuries that are stereotypically associated with sexual assaults, were evident in relatively few trials. Nevertheless, in a number of cases, juries appear to have accepted that consensual sexual contact is compatible with quite high levels of violent behaviour. This was particularly evident in those cases where the accused were convicted of non-sexual offences involving violence committed on the same occasion as the sexual offences charged, and yet not convicted of those sexual offences. However, in no trial was there evidence of grievous bodily harm within the meaning of s2A(3) of the *Criminal Code* such that could constitute prima facie evidence of lack of consent. Accordingly, this study supports conclusions that have been voiced elsewhere that provisions like s2A(3) are likely to have minimal or no impact on sexual offences trials.²⁴²

The focus of attention in determining both complainants' and accused's states of mind, (that is whether the complainant had consented to sexual contact and whether the accused might have honestly and reasonably though mistakenly believed that she was consenting) was upon complainants' conduct and what complainants did to communicate unequivocally their refusal of consent. In only a minority of cases did the accused give evidence of positive steps that they had taken to obtain or ascertain consent. With respect to complainants' conduct, it appears that where complainants could be represented as having offered insufficient resistance or as having responded passively, juries were slightly more likely, though by no means predictably more likely, to entertain a reasonable doubt about the accused's guilt.

It is submitted that these features of sexual offences trials are the logical outcome of the fact that under the current law, 'the concept of consent applies in the negative'²⁴³ which means that 'the law looks for manifest dissent rather than positive assent'.²⁴⁴ The result is that concepts of mutuality and reciprocity between sexual partners do not play any meaningful role in the current criminal law relating to sexual offences. For example, in no case examined in the present study was it suggested by the trial judge that the reasonableness of an accused's possible mistaken belief in consent might be assessed by reference to any steps that he took or failed to take to ascertain the complainant's state of mind.

In recent years the view has been expressed that the criminal law, both in form and in practice, fails to recognise and adequately protect the equal rights and autonomy of sexual

²⁴² See for example, The Hon. Justice EW Thomas, (1994) *surpa* p 429.

²⁴³ Ibid.

²⁴⁴ Ibid.

partners and that one reason for this failure is that it conceptualises consent, in the negative, as requiring proof of dissent, rather than conceptualising it in the positive as involving mutual agreement.²⁴⁵ Reforms contained in the Criminal Code Amendment Bill 1999 (Tas.) (Version 2), aim to ameliorate this problem by achieving a subtle but important shift in jury inquiries concerning consent. That shift involves focusing attention away from absence of consent as evidenced by clearly conveyed dissent and focusing instead upon the existence of a mutually communicated agreement.

The relevant reforms provide first that 'consent' means 'free agreement'.²⁴⁶ They then specify non-exhaustive circumstances in which a person does not freely agree.²⁴⁷ In addition, they require the trial judge to direct the jury that particular behaviour on the part of the complainant that might otherwise be considered to establish free agreement, including absence of dissent, lack of resistance and lack of injury, are not to be regarded as conclusive of this issue.²⁴⁸ Finally, they mandate the trial judge to tell the jury that the fact that the complainant did not do or say anything to indicate agreement is normally enough to indicate there was no agreement.²⁴⁹

Under this regime, agreement is required to be affirmatively communicated by words or conduct. The question for the jury is, was there a communicated agreement? The onus rests upon the Crown to show beyond reasonable doubt that there was no affirmatively communicated agreement. The doubt that the jury need to entertain in order to acquit the accused is a doubt that agreement had not been positively communicated. The defence of mistaken belief in consent would also necessarily hinge upon the accused believing, honestly and reasonably, that the complainant had communicated her consent to engage in sexual activity.

As His Honour, Justice E.W. Thomas has pointed out, these reforms achieve more than a mere semantic change in the law. His Honour stated:

'A change along these lines would not be merely semantic. It would reflect a shift in emphasis from bare or negative consent to mutuality and more directly focus the jury's attention on that issue. Moreover, it would enable the Judge to direct the jury in terms which would be inappropriate at present'.²⁵⁰

The jury is no longer looking for proof of refusal of a presumed consent, but for evidence that agreement was not positively communicated. To understand the implications of this change one need only consider how evidence that the complainant had remained passive or did not physically resist would be constructed under the proposed reform. It could not be used, as it currently is, to provide an evidentiary foundation for proof of consent as constituted by absence of dissent. Instead, a complainant's passivity would constitute evidence that consent had not been affirmatively communicated, and it would, therefore, support the inference that the required free agreement did not exist.

The reform proposed in the Criminal Code Amendment Bill 1999 (Tas) (Version 2) is modelled on legislation enacted in Victoria in 1991.²⁵¹ Legislation with similar aims has also

²⁴⁵ Ibid and see also B McSherry, (1998) *supra* pp 26-40; V Waye, (1992) *supra* pp 94-105; S Bronitt, (1992) *supra* pp 289-310; C Boyle, (1994) *supra* pp 137-156; D Cameron, (1994) *supra* pp 27-30; L Jamieson, (1996) *supra* pp 55-73.

²⁴⁶ Section 4(a) Criminal Code Amendment Bill (Tas) (1999).

²⁴⁷ Ibid.

²⁴⁸ Section 4(g) Criminal Code Amendment Bill (Tas) (1999).

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ The Hon. Justice EW Thomas, (1994) *supra* p 429.

²⁵¹ *Crimes (Rape) Act 1991* (Vic).

been enacted in the Northern Territory,²⁵² the Australian Capital Territory²⁵³ and in New Zealand.²⁵⁴ However, the reforms in these last three jurisdictions provide only that the fact that the complainant did not protest or offer physical resistance does not, by itself, constitute consent. The legislation does not require trial judges in these jurisdictions to direct juries that the fact that the complainant did not do or say anything to indicate free agreement is normally enough to show that there was no free agreement. Accordingly, the Northern Territory, the Australian Capital Territory and New Zealand legislation does not promote the notion of mutuality and communicated agreement in sexual relations to the same extent as the Victorian legislation and the proposed Tasmanian reform. In this regard, His Honour Justice EW Thomas said of the New Zealand legislation, 'the issue is not redirected from a negation of consent to the more positive concept of mutuality'.²⁵⁵ Accordingly, His Honour considered that legislative reform along the lines of the Victorian model is to be preferred.²⁵⁶

Another positive aspect of the proposed Tasmanian reform is that it will reinforce the approach taken by a number of trial judges in the cases analysed in this study where it was stressed that submission is not to be equated with consent and that violence is not a necessary component of rape.²⁵⁷ Clearly, the trial judges in these cases were attempting to deal with possible misconceptions that juries might have concerning what does and does not constitute a valid consent and what does and does not constitute rape. To some extent these judges were engaged in a 'myth-dispelling' exercise, trying to refute notions that reluctant acquiescence might be viewed as consent and that unless the will of the complainant has been overcome by violence, she cannot have been raped. The proposed reforms will enhance trial judges' efforts in this regard and place them on a formal footing as the approach to be applied in all cases.

For these reasons, the current report recommends that the reforms contained in the Criminal Code Amendment Bill 1999 (Tas), s4(a) and (g) be enacted in their present form.

Recommendation Number 1: That the reforms contained in the Criminal Code Amendment Bill 1999 (version 2), s4(a) and (g) with respect to the definition of consent as 'free agreement' and with respect to the special directions to be given to juries relating to consent be enacted in their present form.

5.2 Circumstances Vitiating Consent

The present study found that the vitiating circumstance under s2A relied upon most frequently in the prosecution of sexual offences was that consent had been obtained by physical force. This is, of course, the least controversial basis for vitiating consent and the one most likely to be understood and, therefore, accepted by the jury. In only one case encountered in the present study was consent said to have been vitiated on grounds other than those provided in s2A. Nevertheless, this case demonstrates that the matters listed in s2A as nullifying consent are applied, in practice, inclusively and not exclusively.

The broad reading that was given to the meaning of the term 'fraud of any kind' in s2A(1)(a) in that case where this matter arose for consideration in the present study, also suggests that the controversial, restrictive common law interpretation of 'fraud' in cases like *Mobilio* may have been effectively ousted by or will not be applied to the current Code provision. If this is so, then it will be unnecessary to incorporate into s2A specific provision to cover the type of

²⁵² *Criminal Code* 1993 (NT), s192A.

²⁵³ *Crimes Act* 1900 (ACT), s92P.

²⁵⁴ *Crimes Act* 1961 (New Zealand), s128A(2).

²⁵⁵ The Hon. Justice EW Thomas, (1994) *supra* p 429.

²⁵⁶ *Ibid.*

²⁵⁷ See paras 4.2.1 and 4.3.2.

situation that arose in *Mobilio*, that is, misrepresentation as to the nature of and reason for medical procedures. Specific provisions of this kind have been enacted in other Australian jurisdictions.²⁵⁸

In contrast, the same optimism cannot be felt where the interpretation of s2A(2)(b) is concerned. The Tasmanian Court of Criminal Appeal adopted a narrow view of this provision in *Crisp* and its interpretation in all but one of the cases encountered in the present study was similarly relatively restrictive. Specifically, this provision has been viewed as applying only where the complainant does not appreciate that she can refuse to comply with the accused's demands or where the accused's demands are accompanied by overbearing conduct or threats of such a nature as to rob the complainant of any real choice. However, in the most recent case where this provision arose for consideration, a broad view was taken of its operation. There the trial judge looked simply at the position of the accused and its potentially, inherently coercive features vis-a-vis the complainant. His analysis focussed on how the accused could exploit his position, because of those inherently coercive features, to obtain the complainant's compliance.

It is submitted that the approach taken by the trial judge in this case accords with the legislative intent for s2A(2)(b). The narrow approach taken in *Crisp* and the other cases detailed in this study gives no independent operation to s2A(2)(b) beyond the rationality requirement in s2A(1) or the requirement in s2A(2)(a) that consent not be obtained by force or threats of any kind. At the present time, it is uncertain whether the broad reading of s2A(2)(b) will survive on appeal.

The usual interpretation given to this provision gives it little scope for broadening the criminal law's recognition of non-consensual circumstances beyond the traditionally accepted circumstances of physical force, threats of physical harm and complainant irrationality or incapacity to give consent. At the time that s2A(2)(b) was inserted into the definition of consent in the *Criminal Code*, the expectation and hope was that it would facilitate recognition of a broader range of coercive circumstances and non-consensual sexual impositions.²⁵⁹

The findings of the present study suggest that there would be merit in including in s2A of the *Criminal Code* a broader range than is currently provided of non-inclusive circumstances that vitiate consent. Providing a broader list would serve the useful function of expanding current conceptions and understandings of the circumstances that can involve non-consensual sexual impositions. In this regard it would also reinforce those judicial comments alluded to above that rape is not confined to circumstances of personal violence. Consequently, it may also help minimise confusion - community, judicial, prosecutorial or otherwise - concerning the circumstances that can justifiably be regarded as non-consensual.

Among the reasons given by the 1987 Tasmanian Government for not enacting the broader list of vitiating circumstances recommended by the Law Reform Commission of Tasmania were the justifications that the general definition of consent was already wide enough to cover many of those circumstances and that a wider list would complicate and prolong trials. The Model Criminal Code Officers Committee, which is currently making recommendations for an Australia wide applicable Model Criminal Code, has also recommended that the list of circumstances negating consent in the Model Criminal Code be limited to the few non-exhaustive circumstances regarded as central to consent, that is force, fraud, unlawful

²⁵⁸ See *Criminal Code* 1993 (NT), s192(f); *Crimes (Rape) Act* 1991 (Vic), s36(g); *Crimes Act* 1900 (NSW), s61R(2)(a1).

²⁵⁹ CA Warner, (1981) supra pp 24-29.

detention, mistake as to the nature of the act and incapacity to give consent.²⁶⁰ The Committee suggested that because the list is not exhaustive it enables other circumstances to be relied upon to negate consent.²⁶¹ It is submitted that the Committee is and the 1987 Tasmanian Government was too sanguine about the potentially broad application of non-specific definitions of consent. As already noted, during the period of this study there was only one case where a circumstance outside s2A was relied upon to negate consent. As the Law Reform Commission of Tasmania pointed out in its 1982 Report on Rape and Sexual Offences,²⁶² generalised or vague definitions of consent have the effect of preserving or, at least promoting, traditional, narrow conceptions of non-consensual sexual contacts with their emphasis upon physical violence, the infliction or threat of infliction of injury and the incapacity of the complainant to give consent. Findings of the present study support this view.

It is difficult to see how broadening the list of non-consensual circumstances could complicate or prolong trials. After all, it is only ever one or two at most of the listed circumstances that are likely to be relevant to the jury determination at any one trial. Exhaustive directions on the remaining circumstances will not be necessary and trial judges and Crown counsel will indicate to juries, as they currently do, which of the listed circumstances applies to the case being tried.

The Criminal Code Amendment Bill 1999 (Tas) (version 2) would amend s2A of the *Criminal Code* to provide an expanded list of circumstances where free agreement does not exist. The expanded list includes force or the fear of force to the complainant or another person; a threat to use extortion; unlawful detention; being overborne by the nature or position of another person; fraud; mistake as to the nature of the act or the identity of another person; being asleep, unconscious or incapacitated by alcohol or drugs; and being incapable of understanding the nature of the act. This is a broad list but not as broad as that provided in the Australian Capital Territory legislation which also includes the abuse of a position of authority, or of a professional position or other position of trust in relation to the complainant and, additionally, the physical or mental harassment of the complainant.²⁶³

It is submitted that the Australian Capital Territory provision with respect to abuse of a position is clearer and potentially more extensive than the Tasmanian provision relating to the complainant being overborne by the nature or position of the accused. It is quite clearly not limited to situations where the complainant has no understanding of or ability to exercise his or her right to refuse consent. It refers to consent being obtained as a result of the accused's abuse of his position. Its application is not dependent upon the complainant's will being overborne. It also encompasses social situations and relationships possibly not covered by the Tasmanian provision, including professional relationships, such as doctor/patient relationships, teacher/student relationships and even lawyer/client relationships, as well as positions of trust and authority like parent/child relationships, employer/employee relationships and custodian relationships. In its scope, the Australian Capital Territory list is akin to that recommended in the 1982 report of the Tasmanian Law Reform Commission.²⁶⁴ For these reasons, the Australian Capital Territory provision is less susceptible than the Tasmanian provision to a narrow interpretation.

²⁶⁰ Model Criminal Code Officers' Committee (1999) *supra* pp 49–51.

²⁶¹ *Ibid.*

²⁶² Law Reform Commission of Tasmania (1982), *Report No. 31: Report and Recommendations on Rape and Sexual Offences*, Hobart: Tasmanian Government Printer, pp. 14–16.

²⁶³ *Crimes Act 1900* (ACT), ss92P(d) and (h).

²⁶⁴ *Ibid.*

This report supports the provision of an expanded list of circumstances such as is contained in the Criminal Code Amendment Bill 1999 (Tas). However, it recommends that consideration be given to amending that list along the lines of the Australian Capital Territory provision. Specifically, it is suggested that the provision in the Tasmanian legislation that a person does not freely agree where he or she agrees or submits because he or she is overborne by the nature or position of another person, be replaced by a provision that a person does not freely agree if their agreement or submission is caused by the abuse by another person of his or her position of authority over or professional or other trust in relation to the person. Additionally, it is recommended that mental and physical harassment be included in the list of vitiating circumstances.

Recommendation Number 2: That the list of vitiating circumstances contained in s 4(a) of the Criminal Code Amendment Bill 1999 (Tas) (version 2) be enacted but that the proposed s2A(2)(d) be omitted and replaced by a provision along the lines of s92P(h) of the *Crimes Act* 1900 (ACT) and, additionally, that mental and physical harassment be included in the list.

5.3 Mistaken Belief in Consent

In 12 trials examined in the present study the accused relied upon the defence of mistaken belief in consent in the alternative to asserting that the complainant had consented. In a further eight cases the trial judges left the defence of mistaken belief in consent to the jury even though it had not been specifically relied upon as part of the defence case. In only five of the trials where the defence of mistaken belief in consent was in issue was there any evidence that the accused had taken any positive steps to obtain or ascertain complainants' consent. This reinforces the earlier finding that the criminal law, in form and operation, does not currently reflect the view that sexual encounters involve mutual obligations with regard to the communication of desires and agreement. Instead, the responsibilities are all one way. The complainant is required to convey her refusal of consent unequivocally and forcefully. The accused is entitled to presume that consent exists until the complainant communicates her reluctance or refusal to the requisite degree, whatever that is. This is problematic because determination of what is 'the requisite degree' of communicated rejection inevitably involves value judgments that are susceptible to wayward notions about what is normal sexual behaviour for men and women. The notions are 'wayward' in the sense that they may be based upon views like that expressed in one Australian text book,²⁶⁵ that a woman's initial reluctance and refusal may be no more than an invitation to press her a little harder, in other words, that 'no may mean yes or maybe'.

From the point of view of protecting individual's physical and sexual autonomy, the defence of mistaken belief in consent under s14 of the Tasmanian *Criminal Code* has the advantage over that applying in common law jurisdictions, that it requires the accused's mistaken belief to be reasonable and not merely honest. In theory, under the Tasmanian law an accused cannot be exonerated if his conduct is guided by unreasonable though honestly held beliefs concerning what constitutes willing participation in sexual activity. Nevertheless, even based upon an objective test, the defence of mistaken belief in consent remains problematic. For example, there is the question: if a jury finds beyond reasonable doubt that consent was not present, how could it have been reasonable for an accused to have believed that the complainant was consenting?

²⁶⁵ B Fisse, (1990) *supra* p 178.

Further, there is the problem of categorising what occurred where the accused is acquitted because he believed what happened was consensual sex while for the complainant, it was rape. This problem has been stated most clearly by Dr Lynn Jamieson:

‘...if a woman believes what is occurring is rape and the man does not, then, in law it is, indeed, not rape. Having ruled that no crime has occurred, the law does not have to answer the question, “what is it then, if it is not rape?” or “if it is not rape, is it consensual sex?”’²⁶⁶

There is also the question, ‘why is it not rape?’ Why is it acceptable for someone to make such a grave and invasive physical imposition upon another and avoid liability on the grounds that he made a mistake, that he didn’t take sufficient care, that he didn’t sufficiently care for the other person’s physical integrity or feelings to take action to avoid any mistake? How can mistakes about another person’s willingness to have sex ever be genuinely reasonable? The basis of such mistakes must surely lie in unchecked assumptions about the other person’s behaviour or in generally applied, but also unverified, assumptions about everyone’s sexual behaviour. In other words, they must arise from inadequate communication with the other person. Why should an unchecked assumption of any kind or inadequate communication provide grounds for exonerating a person who has imposed his or her unwanted sexual attentions upon another? This, of course, is the nub of the problem concerning the defence of mistaken belief in consent – it reinforces the lack of mutuality required by the criminal law for sexual encounters. In its current form the law permits inadequate communication and failure to take mutual responsibility for ensuring consent either to be regarded as reasonable behaviour or to be ignored in determining whether the accused should be acquitted on the grounds of his mistaken belief.

One possible remedy of this deficiency lies in imposing upon an accused the duty to take reasonable steps to verify the existence of consent as a precondition to reliance on the defence of mistake. The Criminal Code Amendment Bill 1999 (Tas) contains a provision to this effect.²⁶⁷ This reform, it is submitted, is a logical concomitant of the proposed reforms to the law relating to consent. It reinforces the communication standard and mutuality of obligation in relation to communication sought to be established by those reforms. Moreover, it reaffirms the view that passivity, lack of resistance or lack of response should not by themselves be regarded as constituting consent. Faced with passivity, with a complainant who does not do or say anything to indicate agreement, these reforms require an accused to take steps to clarify his understanding of the complainant’s state of mind. He cannot rely upon the complainant’s lack of resistance to justify a mistaken belief that she was consenting.

It is further submitted that this reform is a necessary adjunct to the reforms to consent contained in the Bill. It is necessary because it enables full effect to be given to the new definition of consent and to the directions that trial judges are mandated to give juries in relation to consent. One of the weaknesses of the Victorian law upon which the amendments relating to consent in the Criminal Code Amendment Bill 1999 (Tas) are based is that the Victorian law does not completely tackle the problem that passivity may be equated by an accused with consent. This is because the Victorian law retains a subjective mental element for the crime of rape and a subjective test for the defence of mistaken belief in consent. Consequently, even if the jury find that the complainant was non-responsive and, therefore, did not give free agreement to sexual intercourse with the accused, it may, nevertheless, be found that the accused may have honestly interpreted her lack of resistance as agreement. The Victorian accused’s mistaken belief in consent does not have to be a reasonable belief or

²⁶⁶ L Jamieson, (1996)supra pp 55–73.

²⁶⁷ Section 4(b).

based upon reasonable steps he has taken to ascertain consent. It simply has to be honest and may, therefore, be unreasonable.

The proposed reform to the Tasmanian law of mistake is based upon reforms to the same effect enacted in 1992²⁶⁸ to the Canadian *Criminal Code*. The resultant limitations on the defence of mistaken belief in consent in the Canadian Code were recently interpreted by the Canadian Supreme Court in *R v Ewanchuk*²⁶⁹. In that case it was held that an accused will only be exonerated upon the grounds of mistaken belief if there is evidence that he believed that the complainant had communicated her agreement to engage in sexual activity. A belief by the accused that that the complainant in her own mind wanted him to touch her but did not express that desire, does not constitute a defence. Accordingly, the accused's speculation as to the complainant's state of mind can provide no defence. Further, a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law and provides no defence and a belief that a complainant's silence or lack of expressed agreement constituted an invitation to persuade a little harder, can also provide no defence. In other words, the Court held, an accused cannot say that he thought, 'no meant yes'. Similarly, he cannot say that he thought, 'no meant maybe'.

Clearly, on this interpretation this reform positively refutes the notion that 'no may mean yes'. It, therefore, accords with the approach taken in those cases examined in the present study where the trial judges pointed out to the jury that a finding that the complainant had verbally rejected the accused's advances, that is, said, 'no' or 'stop', would deny the existence of any reasonable basis for a belief in consent.²⁷⁰

This reform does not of course deal with all the problems that have been raised here in relation to the defence of mistaken belief in consent. It does, nevertheless, reinforce and enable full effect to be given to the proposed reforms relating to consent. Accordingly, this reform is supported by this report.

One solution that would solve all the problems that have been detailed here lies in abolishing the defence of mistaken belief in consent where sexual offences are concerned. This would mean that the crime of rape would be complete on proof that penetration had occurred without free agreement. It is acknowledged that such a reform would be considered radical and strongly resisted in some quarters. Nevertheless, it has been suggested as a serious possibility by His Honour Justice EW Thomas.²⁷¹ It is, therefore, suggested that this matter should now be placed upon the agenda for serious debate.

The principal justification for such a reform is that it gives full effect to the view that sexual encounters necessarily involve equal obligations and equal rights. This view of sexual relations is that it is not acceptable or reasonable for one person to be mistaken about another person's willingness to engage in sexual activity. Respect for other individuals demands that there be no such mistake. The defence of mistaken belief in consent, however couched, on a subjective or an objective test, represents a view that ignorance of another person's wishes where intimate sexual contact is concerned is a permissible basis on which to conduct a sexual encounter. The point has been made on a number of occasions that the law serves a powerful educational and symbolic function.²⁷² Consequently permitting a person charged with rape to be exonerated on the grounds that he did not take care to ascertain with certainty that there was free agreement, communicates the wrong message to the community. A

²⁶⁸ *Criminal Code* (Canada), s273(2)(b).

²⁶⁹ (1999) 131 C.C.C. (3d) 481.

²⁷⁰ See para. 4.9.2.

²⁷¹ (1994) *supra* p 430.

²⁷² See for example, K Warner, (1994) *supra*; L Jamieson, (1996) *supra* pp 55 – 73.

number of commentators have noted that it 'prioritises male perceptions over women's experiences'²⁷³ and 'bolsters macho masculinity at the expense of all women and some men far beyond the courtroom'.²⁷⁴

The arguments promulgated by Jennifer Temkin²⁷⁵ with respect to the desirability of abandoning the subjective test for mistake where sexual offences are concerned apply with equal force to the proposition that the defence of mistake should be abandoned altogether for these offences. To paraphrase Temkin's arguments: it is possible for a man to ascertain whether a woman is consenting with minimal effort. She is there next to him. He only has to ask. To have sexual intercourse with her without her consent is to do her great harm. Accordingly, to require him to inquire carefully into consent and to take careful notice of what is said, is neither unjust nor particularly onerous. A mistaken understanding in this context is easily avoided and untenable. Accordingly, it is recommended that the question of abolition of the defence of mistaken belief in consent in sexual offences cases be placed upon the public agenda for debate.

Recommendation Number 3: That the amendments contained in s4(b) of the Criminal Code Amendment Bill 1999 (Tas) (version 2) be enacted.

Recommendation Number 4: That the question of the abolition of the defence of mistaken belief in consent in sexual offences cases be placed upon the public agenda for debate.

5.4 Further Observations and Recommendations

The trial judges' summations examined in the present study did not contain the type of infelicitous remarks documented in the Senate Standing Committee Report, *Gender Bias and the Judiciary*²⁷⁶ that have given rise to community concerns that trial judges may be out of touch with modern views concerning appropriate sexual conduct. In addition, clear attempts were observed in a number of cases by trial judges to disabuse jurors of possibly stereotyped and legally incorrect views they might hold concerning what constitutes real rape. In one case, the trial judge went so far as to tell the jury that despite some mainland judicial pronouncements to the contrary, 'no means no'. Nevertheless, the view remains current that passivity or lack of resistance may constitute evidence of consent or provide a foundation for a mistaken belief in consent. In addition, the view has not been entirely discarded that reluctant acquiescence may constitute consent. However, it is now a view whose appearance is rare and trial judges were more consistently found to be concerned to convey the view to the jury that submission is not to be equated with consent.

Two matters that were observed in the present study that warrant further mention are first, how trial judges, in summing up, related the evidence in the case being tried to the law and, second, the basis upon which the defence of mistaken belief in consent was left to the jury.

The present study found that in a number of cases, trial judges' summations to the jury did not directly relate relevant evidence in the case to the law. Instead, the trial judges tended to explain the law to the jury, to summarise the evidence for the Crown and the defence but not to relate the latter to the former in any detailed fashion. This style of summation was particularly noted in those cases where the defence of mistaken belief in consent was left to the jury by reference to the entirety of the evidence rather than by reference to evidence considered to have particular or specific relevance to this matter. As noted earlier, the

²⁷³ K Warner, *Ibid.* p 5.

²⁷⁴ L Jamieson, (1996) *supra* p 68.

²⁷⁵ J Temkin (1983) *supra* pp 15-16.

²⁷⁶ Senate Standing Committee on Legal and Constitutional Affairs, (1994) *supra*.

problem with this approach is that it may provide insufficient guidance to the jury and may be more confusing than enlightening. It also begs the question whether it adequately discharges the trial judge's responsibilities with respect to summing up as set down by the High Court in *Alford v Magee*:

'the law should be given to the jury not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case. ... that the judge was charged with, and bound to accept, the responsibility (1) of deciding what are the real issues in the particular case, and (2) of telling the jury, in the light of the law, what those issues are'.²⁷⁷

A related problem arising in these cases is that it was not clear from the summations that the trial judges had left the defence of mistaken belief in consent to the jury on a sufficient evidentiary foundation. In some of these cases it appeared that the defence was left as a matter of generally applied judicial practice. It is submitted that in view of the Court of Appeal's decisions in *Ingram*²⁷⁸ and *Dalwood*²⁷⁹ this approach is inappropriate. These cases made it clear that the defence should be left wherever it is supported by a sufficient evidentiary foundation, but only where it is so supported. Further, Chambers J in *Ingram* indicated that there may be no room for the defence where the complainant's and the accused's account are in stark and violent contrast. This point appears to have been overlooked in four cases in the present study where the competing accounts fitted this description and where the defence was left by the trial judges of their own motion and without reference to specific evidence that might support it. It is submitted that the approach now followed in Canadian cases is to be preferred and that the defence of mistaken belief in consent should only be left to the jury where there is a clear preliminary determination by the trial judge that evidence exists which lends 'an air of reality to the defence'.²⁸⁰

It is submitted that these problems may be ameliorated to some extent by the enactment of the reform contained in s4(b) of the Criminal Code Amendment Bill 1999 (Tas) (version 2) which limits the availability of the defence of mistaken belief in consent. This reform will have the practical effect of requiring the trial judge, as a preliminary matter, to determine the question of whether the accused took reasonable steps to ascertain consent. This should exclude the possibility for this defence to be left to the jury as a matter of practice without reference to its evidentiary foundation. It should also achieve the result that trial judges will consider in greater detail in summing up, specific evidence that bears upon the defence of mistake.

Accordingly, Recommendation Number 3 above is reiterated here.

²⁷⁷ See also *Tegg* (1982) 7 A. Crim. R. 188 at 200 (Tasmanian Court of Criminal Appeal); *Jellard* [1970] V.R. 802 at 804 (Supreme Court of Victoria); *Schmahl* [1965] V.R. 745 at 747 (Supreme Court of Victoria).

²⁷⁸ [1972] Tas S.R. 250.

²⁷⁹ Unreported Court of Criminal Appeal Decision, Serial No 99/1967.

²⁸⁰ *R v Esau* [1997] 2 S.C.R. 120; *R v Osolin* [1993] 4 S.C.R. 595; *R v Ewanchuk* (1999) 131 C.C.C. 481.

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